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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 1

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA AND ARKANSAS RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

BRIEF ON REARGUMENT ON BEHALF OF MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, BURLINGTON-ROCK ISLAND RAILROAD COMPANY, GULF, COLORADO AND SANTA FE RAILWAY COMPANY, PANHANDLE AND SANTA FE RAILWAY COMPANY, AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

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STATEMENT.

This case was argued and submitted on October 12 and 13, 1931. By order of the Court of May 31, 1932,

this case was restored to the docket for reargument upon all questions involved, and the attention of counsel was "invited to the question whether the respective relations of the Louisiana ports and the Texas ports to the export, import, and coastwise traffic affected, and to the rates condemned, by the orders in controversy are such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of Sections 3(1) and 15(1) of the Interstate Commerce Act and that the Texas ports may be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of the same sections."

This brief is filed on behalf of the above-named appellees, who were interveners in the court below in support of the Commission's orders under attack and parties to the proceedings before the Interstate Commerce Commission known as Docket 12798, *Galveston Commercial Association* v. *Galveston, Harrisburg & San Antonio Railway Company, et al.*, and Docket 20685, *The Cooper Grocery Company, et al.* v. *Angelina & Neches River Railroad Company, et al.*

All of these appellees either directly or through subsidiary railroad corporations have lines of railroad to one or more of the Texas ports of Galveston, Houston, Texas City, and Beaumont, and have a vital interest in this proceeding.

Plaintiffs below, and appellants here, challenge the legality of orders of Division 2 of the Interstate Commerce Commission of June 24, 1925, and of the Interstate Commerce Commission of June 29, 1927, and December 23, 1929, finding that the maintenance by defendant carriers before the Commission of the same rates to New Orleans as to Galveston and other Texas ports taking the same rates on export, import, and coastwise traffic to and

from the territory described in such report, resulted in undue preference to New Orleans and undue prejudice to Galveston and the other Texas ports, and that such undue prejudice should be removed by establishing from and to interior points from which the short-line distances to New Orleans do not exceed those to Galveston by more than approximately 25 per cent rates to or from Galveston and other Texas ports taking the same rates, as the case may be, which do not exceed the contemporaneous rates on the same commodities to or from New Orleans; and by establishing from or to interior points from which the short-line distances to New Orleans exceed those to Galveston by more than 25 per cent, rates to or from Galveston and the other Texas ports taking the same rates, which do not exceed rates which are less than the contemporaneous rates on the same commodities to or from New Orleans by the amounts prescribed in such orders.[1]

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1. Grain and grain products from Kansas on, south, and east of the line of the Rock Island from and including Liberal to but not including Hutchinson, and from Oklahoma and Texas on and north of the lines of the Rock Island and the Chicago, Rock Island & Gulf, hereinafter collectively or separately referred to as the Rock Island, from and including Oklahoma City through Clinton, Okla., and Amarillo, Tex., to the Texas-New Mexico State line, 1 cent; from Oklahoma and Texas south of the Rock Island lines just described, 2 cents.

Asphalt from southern Kansas north of the Rock Island line above described, 1 cent; from Kansas, Oklahoma, and Texas on and south of that line and on and north of the Rock Island lines in Oklahoma and Texas above described, 2 cents; from Oklahoma and Texas south of those lines, except the Houston-Beaumont-Port Arthur groups, 3 cents; from the Beaumont-Port Arthur group, 6 cents.

Bagging (cotton-bale covering), cotton-bale ties, and buckles, to Oklahoma and Texas on and north of the aforesaid Rock Island lines, 3 cents; to Oklahoma and Texas south of those lines, 6 cents; to southwestern Louisiana, 5 cents.

Bags (burlap, jute, gunny, cotton, clayed cotton, and cotton lined) and related articles to Oklahoma on and north of the aforesaid Rock Island lines to the Oklahoma-Texas State line, 3 cents; to Oklahoma south of that line, 6 cents; to southwestern Louisiana, 5 cents.

Green coffee to Texas, 9 cents.

Cotton-factory products and related articles from Texas, 12 cents.

Cottonseed and peanut cake and meal from Oklahoma and Texas on

There is also involved in this appeal the order of the Interstate Commerce Commission entered in Docket 20685, *The Cooper Grocery Company et al.* v. *Angelina & Neches River Railroad Company et al.* In that proceeding the Commission found in its report of December 23, 1929 (Rec., 3438), that the rate on green coffee, in carloads, from New Orleans to Waco, Texas, was not unreasonable, but that it was and for the futrue would be unduly prejudicial to complainants at Waco and unduly preferential of their competitiors at Dallas and Fort Worth, Texas, to the extent that it exceeded or would exceed the rate contemporaneously applied on the same commodity from New Orleans to Dallas and Fort Worth. The carriers defendant in that proceeding participated in joint through rates from New Orleans to all of the points involved, Dallas, Fort Worth and Waco, and under the principles hereinafter discussed are properly subject to a finding of prejudice and preference. The issues in that case are exactly similar to and are fully covered in the argument concerning the orders in the main case, Docket 12798, *Galveston Commercial Association* v. *Galvestion, Harrisburg & San Antonio Railway Company et al.*

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and north of the aforesaid Rock Island lines, 3 cents; from Oklahoma and Texas south of those lines, 5 cents.

Cottonseed and peanut oil from Oklahoma and Texas on and north of the aforesaid Rock Island lines, 4 cents; from Oklahoma and Texas south of those lines, 6 cents.

Lumber and forest products taking the same rates from southwestern Louisiana, 2 cents.

Packing-house products and related articles, except soap, from Oklahoma and Texas on and north of the aforesaid Rock Island lines, 5 cents; from Oklahoma and Texas south of those lines, 8 cents.

Rice and rice products from southwestern Louisiana, 3 cents.

Rosin from southwestern Louisiana, 2 cents.

Soap from Oklahoma and Texas on and north of the aforesaid Rock Island lines, 4 cents; from Oklahoma and Texas south of those lines, 6 cents.

Turpentine and related articles from southwestern Louisiana, 3 cents; from Texas, 6 cents.

SUMMARY OF ARGUMENT.

I.

Ports may be regarded as localities unduly preferred or prejudiced by the inland railroad rate structure applicable on export, import, and coastwise commerce moving via such ports.

II.

The existence of prejudice or preference is one of fact to be determined by the Interstate Commerce Commission, and its finding of such fact, supported by substantial evidence, is not subject to review in the courts.

III.

The Texas and Pacific Railway Company, Louisiana & Arkansas Railway Company, and Louisiana, Arkansas & Texas Railway Company, serving with their own rails the preferred port New Orleans and participating in joint through rates on all commodities involved to the prejudicial Texas ports, are properly subject to the finding of prejudice and preference made by the Interstate Commerce Commission.

IV.

A discrimination may be unlawful and unjust when measured by the transportation standard, and condemned by the Commission, although the prejudicial and preferential rates be the same in cents per hundred pounds.

V.

In its decisions in the proceeding under review the Commission gave serious consideration and weight to the competitive nature of the export, import, and coastwise traffic involved, in that it permitted complete equalization of the ports from a wide territory, and where full equalization was not permitted it prescribed but nominal differentials.

VI.

The orders of the Commission under attack in this proceeding were not orders designed to regulate industry. They constitute a proper exercise of the Commission's jurisdiction to regulate rates and charges of carriers and are founded solely on transportation conditions.

VII.

The orders of the Interstate Commerce Commission involved in this proceeding do not unlawfully interfere in the managerial discretion of the Texas & Pacific Railway Company nor deprive that company of due process of law contrary to the Fifth Amendment to the Constitution of the United States.

VIII.

The action of the Interstate Commerce Commission in granting fourth section relief constitutes no precedent to guide its actions here. In so far as fourth section relief to circuitous lines to meet the competition of short lines is concerned, the situation is in no sense analogous; and

in any case where fourth section relief is granted it must be upon a finding by the Commission upon the facts before it that Section 3 of the Interstate Commerce Act is not violated.

IX.

The orders of the Commission herein do not constitute a preference of the ports of one State over those of another contrary to Section 9 of Article I of the Constitution of the United States.

ARGUMENT.

I.

PORTS MAY BE REGARDED AS LOCALITIES UNDULY PREFERRED OR PREJUDICED BY THE INLAND RAILROAD RATE STRUCTURE APPLICABLE ON EXPORT, IMPORT, AND COASTWISE COMMERCE MOVING VIA SUCH PORTS.

In its order of May 31, 1932, restoring this proceeding to the docket for reargument upon all questions involved, the Court invited the attention of counsel to the question whether the respective relations of the Louisiana ports and the Texas ports to the export, import, and coastwise traffic affected, and to the rates condemned by the orders in controversy are such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of Sections 3(1) and 15(1) of the Interstate Commerce Act, and that the Texas ports may be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of said sections.

That a port is a locality subject to the protection of Section 3 of the Interstate Commerce Act is established by a consideration of the language and intendment of the Interstate Commerce Act and interpretations placed upon such act by this and other courts and by the Interstate Commerce Commission.

Paragraph (1) and (2) of Section 1 of the Interstate Commerce Act are in part as follows:

> "(1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and

partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

* * *."

Thus all of the provisions of the Act are extended to the inland rail transportation part of commerce between points in the United States and foreign countries, and commerce having a prior or subsequent coastwise movement by water between points in the United States.

By paragraph (1) of Section 3 of the Interstate Commerce Act it is provided:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It would seem, therefore, that the provision of the Interstate Commerce Act forbidding any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, would apply to the rail transportation to and from various ports of the foreign and coastwise commerce of the United States. In approaching this question these appellees have assumed from the language of the Court's order of May 31, 1932, that inquiry was invited only to the question as to whether the Texas and Louisiana ports in their character as ports were localities which might complain of a violation of Section 3 in respect of the commerce involved, and that there is no question but that persons, companies, firms, or corporations engaged in such commerce at the various ports were entitled to the protection of paragraph (1) of Section 3.

In this connection appellees point out that while the finding of the Commission under review in this proceeding was to the effect that the relationship of the assailed rates was and for the future would be unduly prejudicial to Galveston and the other Texas ports, and unduly preferential to New Orleans, such finding was responsive to a complaint which was filed before the Commission by the Galveston Commercial Association, described in said complaint as "a corporation duly organized and existing under the laws of the State of Texas, with its principal office and place of business in the city of Galveston, County of Galveston, Texas, organized for and engaged in the business of promoting the commercial interests of the city and port of Galveston, Texas, of the various individuals, firms and corporations engaged in commerce at said city and port." Further, paragraph 2 of said complaint was as follows:

> "That various individuals, firms and corporations are engaged in shipping various commodities to,

> from and through the port of Galveston in interstate and foreign commerce via the lines of the defendants above named and certain of such individuals, firms and corporations are members of Complainant and Complainant is duly authorized to represent their interest in respect to the matters herein complained of, such persons being herein referred to as individual shippers."

The orders of the Commission, therefore, have two aspects. They are responsive to a complaint alleging injury to various persons and corporations, etc., in their individual capacity, and resulting injury to the city of Galveston in its character of a port of entry and exit for foreign and coastwise commerce. The finding of the Commission that the relationship complained of resulted in injury to the Texas ports and its manner of remedying such violation of the law obviously meet the request for relief, both on behalf of the individuals engaged in commerce at the Texas ports and of the ports themselves. It is submitted, therefore, that apart from the related question of whether or not a port is a locality within the meaning and intendment of Section 3, the orders of the Commission should be sustained as an appropriate grant of relief to persons or corporations engaged in commerce at such ports.

However, the orders may also be sustained upon the ground that the ports themselves are localities entitled to the protection of Section 3 with respect to foreign and coastwise commerce engaged in at such ports.

The character of ports as localities within the meaning of Section 3 of the Interstate Commerce Act, has been recognized by the Commission from the beginning of its administration of the Act in a number of cases in which it has taken jurisdiction and either approved or prescribed differentials in freight rates applying on traffic to or from the various ports for prior or subsequent

movement in foreign commerce. *In re Export Trade of Boston*, 1 I. C. C. 24, *New York Produce Exchange*, 7 I. C. C. 612, *In re Differential Rates*, 11 I. C. C. 13, *Chamber of Commerce of State of New York* v. *R. R. Co.*, 24 I. C. C. 55, 27 I. C. C. 238, *In re Import Rates*, 24 I. C. C. 78, *Mobile Chamber of Commerce* v. *Mobile & Ohio R. R. Co.*, 57 I. C. C. 554, *Cosmopolitan Shipping Company* v. *Hamburg American Packet Co.*, 13 I. C. C. 266.

In *New York Produce Exchange* v. *Baltimore & Ohio R. R. Co.*, 7 I. C. C. 612, the Commission assumed jurisdiction of a complaint by the named complainant that differentials on various commodities, principally grain and packing-house products, for export, from western origins to the north Atlantic ports, were prejudicial to New York and unduly preferred Boston, Philadelphia, Baltimore, Newport News, and Norfolk, as localities.

In defining the question before it the Commission said (page 658):

> "The question before us for consideration is, therefore, whether these differentials are in violation of the Interstate Commerce Act. The complainant alleges that they are in contravention of the third section of that Act, for the reason that they discriminate against the locality of New York and in favor of the localities of Baltimore and Philadelphia."

In that case the Commission upon the facts before it dismissed the case without prejudice, but it was referred to as an early recognition by the Commission of the character of a port as a locality subject to the protection of the prohibition in Section 3 of the Interstate Commerce Act against prejudice to it and preferences to other ports in the adjustment of inland freight rates on traffic moving in foreign commerce.

The differentials to north Atlantic ports were before the Commission again in *Chamber of Commerce of New*

York v. *N. Y. C. & H. R. R. Co. et al.*, 24 I. C. C. 55. In that case, at page 74, in referring to an agreement of the rail lines as to the differentials to be observed as between traffic to and from the various ports, the Commission said:

> "It is clear that the differential agreement was originally made in an attempt to equalize the total charges on import and export traffic through the several ports, as gateways. We have no jurisdiction of the ocean rates and must deal with this question as though the ports were destinations instead of gateways. This does not mean that the carriers may not take into consideration the previous or further transportation of the traffic on the ocean and thus differentiate it, reasonably, from domestic traffic, but the rates to and from the ports must be reasonable, must be published as independent from the ocean transportation, and are subject to all of the provisions of the act. *Cosmopolitan Shipping Co.* v. *Hamburg-American Packet Co.*, 13 I. C. C. 266; *Armour Packing Co.* v. *U. S.*, 209 U. S. 56. It is our duty to see that shippers are accorded reasonable rates and that undue discrimination is not practiced against shippers, commodities, or communities. It is also our duty to consider the interests of all of the shippers and communities affected and to refrain from condemning discriminations which are not unjust."

In *Cosmopolitan Shipping Co.* v. *Hamburg-American Packet Co.*, 13 I. C. C. 266, the Commission, at page 273, after quoting the language of Section 1 hereinabove quoted, stated:

> "By this language Congress sought to certainly exclude purely state traffic and to as certainly include foreign traffic even when its movement was wholly within a state. Therefore the rates on cotton moving for export from Dallas, Tex., to Galveston, although the movement is wholly within a state, are subject to Federal regulation. And, likewise, machinery moving from Syracuse to New York City upon through billing to a European point comes

under the control of Federal authority rather than state authority, because it is foreign commerce."

That all of the pertinent provisions of the Interstate Commerce Act, apply to commerce moving by rail to a port in the United States for trans-shipment to a foreign country, was recognized by this Court in *Armour Packing Company* v. *United States*, 209 U. S. 56. In that case the Court, at page 78, says:

> "What reasonable ground is there for supposing that Congress intended to exercise no control over such commerce if it happens to be billed through to the foreign port? Such construction would place such important commerce shipped in the United States to a port for transshipment abroad wholly outside the restrictions of the law, and enable shippers to withdraw such commerce from the regulations enforced against other interstate commerce by the expedient of a through bill of lading. Take the present case. The through rate is obtained by adding the ocean rate to the inland rate. There is no contractual relation between the railroad carrier and the ocean carrier. The ocean rate is uncertain and variable, depending upon time of sailing and available space. The accommodation for ocean shipment was obtained by the shipper and by it made known to the inland carrier. We think the language of the statute, read in the light of the manifest purpose of its passage, shows the intent of Congress to bring interstate commerce within the control of the provisions of the law up to the time of ocean shipment. This construction is reinforced by the broad provisions of Section 6 of the act as to publishing schedules, showing rates, fares and charges, and filing the same with the Interstate Commerce Commission. That such rates, notwithstanding through bills of lading, were subject to the provisions of the act, was held, upon full consideration, and rightfully, as we think, by the Interstate Commerce Commission. *Re Tariffs* v. *Export and Import Traffic*, 10 I. C. C. Rep. 55."

Appellants in asserting that a port is not a locality which may be preferred or prejudiced within the mean-

ing of Section 3, base such contention principally upon the fact that a port is neither the final destination nor origin of export, import, or coastwise traffic moving through it but that it merely levies toll on such commerce.

While it is true that such commerce has either a further or prior movement beyond the port, nevertheless the inland rail portions of the haul on such traffic and the rates charged therefor are subject to all the provisions of the Interstate Commerce Act, as was held by this Court in *Armour Packing Company* v. *United States, supra.*

Nor do the ports levy toll upon commerce engaging their facilities in the sense of a tax or burden upon such commerce. To the contrary the ports offer to such commerce facilities indispensable to its very existence. Without the wharves, docks, and elevators over and through which such commerce passes, there could be no commerce. Likewise the brokers, dealers, factors, insurance agencies, and other persons and corporations of like character perform a service vitally necessary to the carrying on of such commerce. At page 23 of the brief of appellant the Texas and Pacific Railway Company it is stated that there was no intent in the mind of Congress to extend a helping hand to such as wharfingers and warehousemen having no relation to commerce save a parasitic one. Apart from the inaccuracy in denominating the relationship of such businesses as commerce to parasitic, when in fact the commerce could not exist without such aids, the protection of the Interstate Commerce Act is not extended solely to those having contractual relations with the railroads as shippers and receivers of freight.

Under the grain rate structure of the United States wheat originating at country origins may be stopped

in transit at milling and marketing points and move on to a final destination on the through rate applicable from first origin to final destination. These marketing and milling centers neither originate nor terminate traffic, yet they in like manner as do the ports render a necessary and indispensable service to the commodities enroute. The analogy between these marketing and milling centers and the ports is complete, and as the Commission has properly recognized the rights of these grain centers to a reasonable rate adjustment as compared with competing markets, so may it properly recognize the right of ports to a non-discriminatory rate adjustment. In this connection the Court is referred to the case of *Southern Kansas Grain Association* v. *C. R. I. & P. Ry. Co.*, 139 I. C. C. 641. There the cities of Kansas City and St. Louis, Mo., and Atchison and Leavenworth, Kans., on the one hand, and Wichita and Hutchinson, Kans., on the other, were found to be in competition with each other in the marketing, milling, and reforwarding of grain originating at points beyond such cities and reforwarded to Gulf ports for export and to other destinations. In disposing of the case the Commission found that the practice of the carriers in applying from a territory roughly described as southern Kansas through rates on grain to the Gulf ports for export of the same volume via Kansas City over a longer route as applied via Wichita and Hutchinson over a shorter route, resulted in undue preference of Kansas City, Atchison, Leavenworth and St. Louis, and undue prejudice to Wichita and Hutchinson. In that proceeding none of the cities involved nor the parties dealing in grain and its products thereof neither originated nor terminated the traffic. Such cities were themselves but way stations on a longer journey from the farms on which the wheat was grown to its final destination, nevertheless furnishing an indispensable service to the traf-

fic enroute, the Commission properly held the rate adjustment should neither unduly prefer one group of cities nor unduly prejudice the other.

It is clearly evident it was the intention of Congress that the protection provided by the Interstate Commerce Act from violations thereof should not be extended solely to individual forwarders or receivers of freight, but should also extend to localities, communities, and in fact the country at large. This purpose of Congress is evidenced by the use of the broad word "locality" in Section 3 which in itself clearly demonstrates the purpose of Congress to protect not only individuals in their contractual relations as shippers over railroads, but also the broader interests of the remainder of the population not dealing directly with the railroad but dependent for their welfare indirectly upon the commerce flowing over such railroads.

To this end the concluding sentence of paragraph (2) of Section 13 of the Interstate Commerce Act provides:

> "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

This broad purpose of the Interstate Commerce Act and the investment by Congress in the Interstate Commerce Commission of the power to so administer it has frequently been recognized by this Court. In *Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88, the Court at page 102 says:

> "From whatever standpoint the powers of the Interstate Commerce Commission may be viewed, they touch many interests, they may have great consequences. They are expected to be exercised in the coldest neutrality. The Commission was instituted to prevent discrimination between persons and places. * * * Rates may not only be investigated and be pronounced unjust or unreasonable or discriminatory but other rates may be prescribed."

On page 103 the Court continues:

> "The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country."

In *Texas and Pacific Railway Company* v. *Interstate Commerce Commission,* 162 U. S. 197, decided in the first decade after the passage of the Interstate Commerce Act, the Court gave full recognition to the broad purposes of such Act and the extent of the wide discretion vested in the Commission in its interpretation. Thus at page 233 the Court states:

> "The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: That the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable and to forbid undue and unreasonable preferences or discriminations: That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment: That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust,

> the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered: That if the Commission instead of confining its action to redressing, on complaint made by some particular person, firm, corporation or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country."

In the above case the Court clearly announces that the purpose of the Act is broader than redress or protection of the individual shipper; it looks beyond such individual to welfare of the various communities or localities, and to the country as a whole.

It is submitted, therefore, that a port as such in its relation to export, import, and coastwise commerce moving through it and engaging its facilities, may be preferred or prejudiced by railroad rates applying to or from such port. By the Interstate Commerce Act its terms are extended to the foreign commerce of the United States in so far as such transportation takes place within the United States. A shipper or receiver at an inland origin or destination of freight moving in foreign commerce may complain of a violation of the Act as may a shipper or receiver of freight at a port. So may the inland community or locality complain as to freight rates on such commerce if the general welfare and prosperity of such community or locality be imperiled. Can the locality or community at tidewater alone not invoke the protection of the Interstate Commerce Act? Can it be that the Interstate Commerce Act was meant to foster the interests of the inland communities, even in their dealing in foreign and coastwise

commerce, but that the ports, rendering an indispensable service in connection with a substantial part of the commerce of the United States, are without its protection? A study of the decisions of this Court and the Commission indicate otherwise.

As heretofore pointed out, the Commission has from the beginning of its administration of the Interstate Commerce Act recognized ports as localities subject to the protection of Section 3 of the Act. In view of this fact, the Transportation Act of 1920 constituted in effect a Congressional approval of such an interpretation theretofore given that section of the law by the Commission. Where the Legislature or other law-making body re-enacts a statute after uniform construction, the presumption is that the Legislature knew of such construction, and adopted it in re-enacting the statute. *Copper Queen Mining Co. v. Arizona Board*, 206 U. S. 474.

The Transportation Act of 1920 amounted substantially to a revision and re-enactment of the Interstate Commerce Act. By that statute amendments were made to Sections 1, 2, 4, 5, 6, 10, 12, 13, 15, 16, 17, 18, 20, and 24, and Sections 15a, 20a, 25, 26, and 27 were added to the Act. No change however, was made in the existing language of the first paragraph of the third section. It is urged that Congress thus recognized and approved the correctness of the Commission's interpretation of the Act in treating a port as a locality within the meaning of Section 3.

II.

THE EXISTENCE OF PREJUDICE OR PREFERENCE IS ONE OF FACT TO BE DETERMINED BY THE INTERSTATE COMMERCE COMMISSION, AND ITS FINDING OF SUCH FACT, SUPPORTED BY SUBSTANTIAL EVIDENCE, IS NOT SUBJECT TO REVIEW IN THE COURTS.

The question of the existence of prejudice or preference arising out of a given rate adjustment is one of fact to be determined by the Commission. In *C. N. O. & T. P. Ry.* v. *Interstate Commerce Commission*, 162 U. S. 184, at page 194, the Court said:

> "It has been forcibly argued that, in the present case, the Commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the Commission, whose conclusions have been accepted and approved by the Circuit Court of Appeals, and we find nothing in the record to make it our duty to draw a different conclusion."

In *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, at page 238, it is stated:

> "The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence. * * *"

In *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, the Court, at page 170, lays down the same rule in the following language:

> "As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be

> undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case."

In *Pennsylvania Company* v. *United States*, 236 U. S. 351, the Court, at page 361, in referring to Section 3 of the Interstate Commerce Act, states:

> "This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact."

The finding of preference to New Orleans and prejudice to the Texas ports is supported by substantial testimony of witnesses for complainants before the Commission and interveners supporting them, that the practice of the carriers in maintaining a parity of export, import, and coastwise rates as between New Orleans and the Texas ports, notwithstanding the materially greater transportation service involved in the transportation to or from New Orleans, made it extremely difficult for the Texas ports to compete with New Orleans. Being supported by the evidence referred to, the finding of the Commission as to the fact of prejudice and preference can not be reviewed in the courts. Appellants in this proceeding, in effect, seek a review of that evidence and the substitution of the judgment of the Court for that of the Commission as to the weight of such evidence. The finding of the Commission, however, upon

the fact of prejudice or preference, supported by substantial evidence, is final and conclusive. With regard to the power of the courts to review administrative findings of the Commission, this Court in *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, said at page 547:

> "It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In *Western Paper Makers' Chemical Co. et al.* v. *United States, et al.*, 271 U. S. 268, at page 271, the Court said:

> "The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. * * * To consider the weight of the evidence is beyond our province."

This doctrine was again announced in *Virginian Railway* v. *United States*, 272 U. S. 658, where upon page 663 it was said:

> "The Virginian attacks the Commission's finding of unjust discrimination. There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or

whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law. *Western Paper Makers Chemical Co.* v. *United States*, 271 U. S. 268. No irregularity in the proceedings before the Commission is even suggested."

Further at page 665 of the same opinion the following language appears:

"The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

Brief reference will be made to the substantial evidence of record which adequately supports the Commission's orders here involved.

The respective distances between the origin and destination territory involved and New Orleans, on the one hand, and Galveston, on the other, are in the 1927 report of the Commission stated to be as follows (Rec., 3376-7):

"From southern Kansas to New Orleans 898 miles, to Galveston 755 miles, difference 143 miles; excluding points in equalized territory, 930 and 768 miles, respectively, difference 162 miles.

From Oklahoma to New Orleans 691 miles, to Galveston 545 miles, difference 146 miles; excluding points in equalized territory, 720 and 546 miles, respectively, difference 174 miles.

From northern Texas to New Orleans 644 miles, to Galveston 444 miles, difference 200 miles; excluding points in equalized territory, 670 and 457 miles, difference 213 miles."

As to the injury resulting to Galveston and the persons there engaged in export, import, and coastwise busi-

ness, from the prior existing equalized rate structure, see the testimony of witnesses Thornton (Rec., 289-293); Eargle (Rec., 2066-7); Davison (Rec., 2081-5); and Hershey (Rec., 2275-2285).

There is thus clearly of record evidence as to the difference in treatment accorded the competing localities and resulting injury therefrom. That such difference in treatment was not based upon different transportation conditions was determined by the Commission from competent evidence before it, as appears from the following excerpts from its report of June 29, 1927 (Rec., 3410):

> "No witness seriously questioned the finding, first made in *Memphis-Southwestern Investigation*, 55 I. C. C. 515, 523, and since consistently adhered to by us, that the transportation conditions throughout Oklahoma, Arkansas, Louisiana west of the Mississippi River, and Texas common-point territory are substantially the same. The transportation conditions in southern Kansas are at least as favorable as those in the other portions of the Southwest just referred to. With these findings as a base it must follow, unless special circumstances exist with respect to particular commodities, that the differences in distance between the average hauls to the respective ports must approximate the differences in extent and cost of the services rendered by the respective carriers. We say approximate because the differences in volume of traffic and the varying degrees of efficiency in operation and management on the roads forming the various routes between this territory and the Gulf make impossible, of course, an equality of unit cost on every commodity. Consideration must also be given to the fact that the average haul on equalized traffic is greater to New Orleans than to the Texas ports. Attempts were made by witnesses for the Gulf, Colorado & Santa Fe, the Missouri-Kansas-Texas of Texas, and the Missouri-Kansas-Texas system, as well as for the Texas & Pacific, to show in a general way the unit cost of freight service during specified periods on

their respective lines, the evidence with respect to the Texas & Pacific being intended primarily as proof that the revenue from equalized traffic to and from the port of New Orleans more than equals the out-of-pocket cost of the added service, and that on behalf of the Texas lines to show that their unit cost of service is generally less than that of the Texas & Pacific."

Further in the same report (Rec., 3411) appears the following:

"The Texas carriers show that the average operating cost, freight proportion, per 1,000 gross-ton miles for the Gulf, Colorado & Santa Fe was $3.46 in 1923 and $3.02 in 1924, for the M.-K.-T. $3.68 for 1923 and $3.07 for 1924, for the Missouri-Kansas-Texas of Texas $4.07 for 1923 and $3.27 for 1924, and for the Texas & Pacific $4.13 for 1923 and $3.74 for 1924. It will be noted that in both years the average cost of the Texas & Pacific exceeded that of each of the other roads named. The average cost per 1,000 revenue ton-miles was also greater on the Texas & Pacific than on the other roads in 1923 and 1924, except that in 1923 the figure for the Missouri-Kansas-Texas of Texas exceeded that of the Texas & Pacific. Other exhibits making comparisons of the operations of these same roads show that for the 11 months ended November 30, 1924 and 1925, the number of gross and net tons per train on the Texas & Pacific was less than the number on the other roads; that the average cost of maintenance and operation per 1,000 gross-ton miles was greater on the Texas & Pacific than on the Gulf, Colorado & Santa Fe by 21.1 per cent in 1923, 21.4 per cent in 1924, and 26 per cent in 1925. These and other exhibits point to the conclusion that, differences in lengths of haul considered, and without comparing special services on particular commodities, it costs at least as much per mile to handle tonnage over the Texas & Pacific to New Orleans or the other Louisiana ports as it does over the Gulf, Colorado & Santa Fe or the M.-K.-T. to Galveston or any of the other Texas ports."

Nor are the Commission's findings as to transporta-

tion conditions in the slightest way defective because they deal with averages in their study of cost, loading, and other transportation conditions. The difficulty of determination of actual cost of handling a specific commodity is well known to this Court, and the use of averages is further justified by the fact that there was involved before the Commission rates between New Orleans and the Texas ports, on one hand, and many hundreds of interior stations on all lines of railroad in the vast territory heretofore described, on the other hand, on the large number and varied commodities covered by the complaint. A list of these different commodities appears at page 3 of this brief.

The above summary of testimony completely refutes the contention appearing at page 41 of the brief on reargument of the New Orleans Joint Traffic Bureau, that the only transportation condition shown of record or found by the Commission is that the length of haul to New Orleans is longer than to Galveston.

As heretofore stated, the Commission had before it adequate proof of a difference in treatment, resulting injury, and similarity in transportation conditions in the handling of the traffic to and from the preferred and prejudiced points. And in removing an unlawful preference and prejudice the Commission should properly adopt a transportation standard. This Court in *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, said at page 524:

> "To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

This Court has in a number of cases approved the action of the Commission in adopting the transportation standard as reflected by distance as the appropriate method of removing discriminations found to exist. Such was the method of removal of discrimination approved by this Court in the *Shreveport* case, *Houston & Texas Railway* v. *United States*, 234 U. S. 342. The order of the Interstate Commerce Commission approved by this Court in *Georgia Commission* v. *United States*, 283 U. S. 765, was one requiring the carriers to establish intrastate rates "which shall not be lower, distance considered, than those contemporaneously applicable to interstate transportation of the same commodities * * *"

The order of the Interstate Commerce Commission approved by this court in *Alabama* v. *United States*, 283 U. S. 776, was one requiring the carriers to establish and maintain intrastate rates in Alabama for fertilizers and fertilizer materials not lower for corresponding distances than the interstate rates theretofore prescribed by the Commission.

It should be pointed out, however, that full recognition is not given by the Commission's decision to the different transportation conditions, for equalization of New Orleans and Galveston is permitted in all cases where the distance between interior points and New Orleans is not more than 25 per cent greater than the distance between such points and Galveston, and even for differences between the competing ports greater than 25 per cent the differentials prescribed by the Commission are smaller in amount than would result from the application of mileage scales approved by the Commission for application in the territory involved in the respective hauls to and from the Texas ports and New Orleans (Ex. B-17, Vol. VI, Reproduction of Stipulated Exhibits).

The appellants would in effect ask this Court to examine the voluminous testimony herein and substitute its judgment for that of the Commission as to whether the fault of equalizing the rate structure resulted in injury to Galveston or to the other Texas ports, and in support of this purpose at page 42 of the Brief on Reargument of the New Orleans Joint Traffic Bureau reference is made to certain comparisons from the record of total waterborne tonnage moving through New Orleans and the Texas ports. However, if this Court should undertake to examine the evidence in detail, the appellees would point out that any comparisons of total tonnage such as are made in the New Orleans brief are apt to be misleading for the reasons pointed out in the opinions of the Commission herein. Referring to just such a comparison of total tonnage the Commission said at page 360 of its 1927 opinion (Rec. 3381):

> "The foregoing tonnage comparisons, however, do not portray fairly the relative situations with respect to the ports of Galveston and New Orleans. Table 3 of the appendix shows the volume of import, export and coastwise traffic handled in 1912 and from 1919 to 1924, inclusive, by New Orleans, Galveston, Houston, and all the Texas ports combined, together with a percentage index of the growth of those ports since 1912. The figures in this table show, using 1912 as a base, that while Galveston made much greater progress than the other Gulf ports in import traffic and than all other Texas ports, except Houston, in export and coastwise traffic, its progress was less rapid than that of New Orleans and considerably slower than that of Houston in export and coastwise traffic. Of the total traffic handled the percentage of Galveston since 1912 has been much behind that of New Orleans or Houston, as well as all of the other Texas ports combined. In 1924 its total tonnage was 1,309,634 less than in 1920, while that of New Orleans was 886,999 more, and that of all the Texas ports combined 7,231,150 more. In that period Houston in-

creased its tonnage from 714,621 to 5,343,598, or an increase of 4,628,977. The increase in Houston tonnage has been mostly in export and coastwise traffic. The steady increase by New Orleans has been in almost all kinds and classes of commodities moving through Gulf ports while the increase through the Texas ports has been largely in petroleum and petroleum products, grain and grain products, and cottonseed products, the movement of last two of which is seasonal. The principal increase in the movement through the Texas ports has been in petroleum imported from Mexico. In the year ended June 30, 1924, 93 per cent of the imports through the Texas ports consisted of petroleum from Mexico, while the corresponding percentage for the Louisiana ports was only 52. The large balance of the imports through the Louisiana ports, principally New Orleans, consisted of a diversified tonnage destined to a wide interior territory. Of the total exports handled through the Texas ports during that year 91 per cent consisted of petroleum, sulphur, grain and grain products, and cotton."

Further in the same opinion (Rec. 3378) the Commission states:

"For many years, if not since its establishment as a port, the traffic moving through Galveston, excluding Mexican crude petroleum which moves largely in private tankers, has consisted largely of export traffic, of which cotton, cottonseed products, and grain and grain products have composed the major portion. Most of this traffic has moved on rates lower to Galveston than to New Orleans. The movement of these commodities is to a large extent seasonal, within comparatively few months, so that during a considerable part of the year the movement through Galveston is small. The belief was freely expressed by a number of complainant's witnesses experienced in the exportation of traffic through one or more Gulf ports that a complete equalization of rates on all commodities between New Orleans and the Texas ports from and to the affected territory would within a comparatively brief period have the effect of practically closing the Texas ports and diverting the traffic to the Louisiana ports, particularly New Orleans."

For the reasons explained by the Commission, therefore, comparisons of total export and import tonnage did not adequately reflect the injury to the Texas ports from the equalization of rates with New Orleans by reason of the fact that from a large area certain railroads, such as the Santa Fe, did not equalize the rates and maintained lower rates to the Texas ports; and the further fact should be considered in dealing with the total tonnage that the Commission's order requiring differentials does not apply to the huge traffic in petroleum and petroleum products moving through both sets of ports.

Appellants contend that this exclusion of petroleum and petroleum products from its orders by the Commission indicates a lack of logic and the arbitrary character of such orders. No such inference may be drawn therefrom. In fact the exclusion of this commodity merely indicates that the Commission considered separately all of the commodities involved and found as to petroleum that the policy of equalization did not result in injury to the Texas ports. The reason for this exclusion is stated by the Commission in the following language from its 1927 report (Rec., 3398-9):

> "As stated, only one of the major refining companies operating at the Texas ports appeared at the further hearing. This company made no showing that the present adjustment has operated to its injury, and the relative increase in volume of movement of these products through the Texas ports as compared with that through the Louisiana ports indicates quite clearly that under equalization the Texas ports have secured at least a fair share of this export and coastwise business. The principal exporters at the Texas ports are also refiners who receive crude oil, from which their export products are produced, largely by pipe line from the mid-continent field. The interior refiner must purchase crude oil at a premium in competition with the

coastal refiner who can offer a higher price because of cheaper transportation to tidewater. There is a large surplus production of crude oil in the affected territory, and this has resulted in a surplus of refining capacity in those States. These interior refiners must ship their surplus of refined petroleum by rail to tidewater for export, and in doing so they come into keen competition with the large coastal refiners. The Texas port refiners, by reason of the cheaper pipe-line transportation of the crude, now have it within their power to force the interior refiners out of the export market. An increase in the export rate to the Louisiana ports, the only ports through which the interior refiner now has access to the export market, it is testified would remove the interior refiner from that market.

(fol. 5201k-26) Refiners in the interior are scattered over a wide area in the mid-continent field of Kansas and Oklahoma and over the major portion of Texas. Tulsa is generally considered the center of the mid-continent field. The principal interior refiner protesting against disruption of port equalization is located at Tulsa in what would remain equalized territory under the original decision. The situation with respect to this refiner is substantially similar to that of other refiners in the mid-continent field. Its principal product is gasoline. It has no means of transporting its refined products to the domestic or export markets except by rail, and has no means of reaching the export markets with its refined products, a large portion of which consists of gasoline, except through the independent exporters whose facilities are at the Louisiana ports. No such facilities of independent exporters exist at the Texas ports and, because of the fact that the large coastal refiners served by pipe lines are located at those ports, it is doubtful if differentials were established whether any such facilities would become available there. Therefore, any reduction in the rate to the Texas ports without a corresponding reduction to the Louisiana ports could be of no benefit to the interior independent refiner and would result in benefit only to the Texas coastal refiners, in that it would enable them to secure most, if not all, of the export

business now handled by the independent refiners through the Louisiana ports."

All of these issues of fact, however, were determined by the Commission upon an adequate record and are supported by substantial evidence. This Court has said that their findings so made should not be disturbed.

In the Brief on Reargument of the New Orleans Joint Traffic Bureau at pages 15 and 43 reference is made to the case of *Philadelphia & Reading Ry. Co.* v. *United States*, 240 U. S. 334, in support of the doctrine that where the facts reported by the Commission afford no foundation for its findings enforcement of its order will be enjoined, and this appellant would further draw a parallel between the facts in that case and those in the case at bar. There is, however, no analogy whatsoever. In the instant case there was a complaint by Galveston and other Texas ports that the rate adjustment on export, import and coastwise traffic moving between interior origins and destinations in Texas on the one hand and between such origins and destinations and New Orleans on the other hand resulted in undue preference to New Orleans and undue prejudice to Texas ports. However, in the Philadelphia and Reading case referred to there was a complaint by the Allentown Portland Cement Company that the rate adjustment from its plant at Evansville, Pa. to Jersey City was unjust and unreasonable and discriminated against complainant and the locality wherein its plant was situated—that is, Evansville, Pa. The finding of the Commission, however, was that the rate adjustment complained of subjected Jersey City to an undue prejudice and disadvantage. This Court properly pointed out that undue discrimination against either the complainant or the locality of its plant as alleged in its complaint was not found, and that the community found prejudiced by the rate adjustment offered no complaint and

was not party to the proceedings. The facts in the *Philadelphia and Reading case* have no relation to the case before the Court in this proceeding.

In the Brief on Reargument on Behalf of the State of Louisiana it is stated that the Commission erred in that it failed to determine and prescribe what would be just and reasonable individual or joint rates and charges, or maxima or minima, or maxima and minima to be observed to remove the undue prejudice and preference complained of.

The reasonableness of any of the rates was not at issue before the Commission and there was no necessity for a determination or finding by it of such reasonableness. As pointed out in *United States et al.* v. *Illinois Central R. R. Co. et al.*, 263 U. S. 515 (520), "proceedings to remove unjust discrimination are aimed directly only at the relationship of rates." The complaint as finally submitted to the Commission was a proceeding directed only at the relationship of rates. It is true that in *Georgia Commission* v. *United States*, 283 U. S. 765, and *Florida* v. *United States*, 282 U. S. 194, the Commission in removing discrimination against interstate commerce prescribed a just and reasonable level of intrastate rates. The jurisdiction exercised in those cases was different, however, from that here involved. Even under Section 13 (4) of the Interstate Commerce Act, before the sovereign power of the state over intrastate rates can be set aside by federal authority it is readily apparent that there must be a determination that the state rates so prescribed are not in excess of reasonable maxima. This principal was announced in the *Minnesota rate* cases, 230 U. S. 352, and in *Houston & Texas Ry.* v. *United States*, 234 U. S. 342. See also *Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563.

Here there was involved both prejudicial and preferential rates or interstate rates subject to the jurisdiction of the Commission, and except in so far as they may be unlawful to the initiation of voluntary changes therein by the carrier. Within the range of reasonableness maximum rates and rates so low as to cast an undue burden upon the remainder of commerce the carriers should be free to adjust such rate. Under the order of the Commission they are so free to effect that purpose so long as the differences found necessary by the Commission to remove the preference and prejudice between New Orleans and the Texas ports are observed.

III.

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, AND LOUISIANA, ARKANSAS & TEXAS RAILWAY COMPANY, SERVING WITH THEIR OWN RAILS THE PREFERRED PORT NEW ORLEANS AND PARTICIPATING IN JOINT THROUGH RATES ON ALL COMMODITIES INVOLVED TO THE PREJUDICED TEXAS PORTS, ARE PROPERLY SUBJECT TO THE FINDING OF PREJUDICE AND PREFERENCE MADE BY THE INTERSTATE COMMERCE COMMISSION.

Appellants, The Texas and Pacific Railway Company, Louisiana & Arkansas Railway Company, and Louisiana, Arkansas & Texas Railway Company, assert that the Commission's finding of prejudice to the Texas ports and preference to New Orleans could not properly be made with respect to such appellants as they do not serve the Texas ports and have no controlling voice in fixing rates to or from such ports. Stated in another manner, and illustrating just what appellants' contention means, it is that before a carrier can become subject

to an order of the Commission to remove an unlawful preference and prejudice such single carrier must have unhampered control over the rates to both the preferred and the prejudiced points so that without joint or concurrent action of its connections or any other carrier it may, acting singly and alone, comply with the order by increases in the rates to the point or points preferred or reductions in the rates to the point or points prejudiced. This phase of appellants' contention is set out at length at pages 42 and 43 of the brief of the Texas & Pacific on reargument. Such contention is not only unsound in its logic, as has been clearly announced by this Court in the cases which will be hereafter discussed in some detail in this part of the brief, but its adoption would deprive the Interstate Commerce Commission of the power to correct unlawful preferences and prejudices in all cases where joint rates were involved. Such a deprivation would, it is obvious, remove the greater part of the rate structure of the United States from any effective control by the Interstate Commerce Commission in so far as preferences and prejudices were concerned. That this is so is readily apparent from a consideration of the territory and commodities involved in this proceeding and the lines of railroad engaged in such commerce. The relationship of the rates to and from New Orleans, on the one hand, and the Texas ports, on the other hand, on a number of commodities moving in export, import, and coastwise traffic between such ports and a vast territory in Kansas, Oklahoma, Texas, and southwestern Louisiana, was found by the Commission to unduly prefer New Orleans and unduly prejudice the Texas ports.

Consider then the extent to which the various lines of railroad affected by the Commission's order participate in the rates and traffic involved. The Texas & Pacific and Louisiana & Arkansas Companies serve directly

with their own rails the preferred port New Orleans, and, of course, have their own rates between points on such lines and New Orleans. They also participate in joint through rates between New Orleans, on their own lines of railroad, and points on other lines of railroad from the vast territory affected not directly served by their own lines. Also, while they do not with their own rails serve Galveston and the other prejudiced Texas ports, they participate generally in a complete line of joint through rates between points on their lines of railroad and such prejudiced points (Rec., 3228).

The Gulf, Colorado and Santa Fe, Missouri-Kansas-Texas, and certain other Texas carriers serve directly with their own rails one or more of the prejudiced Texas ports, but participate generally in joint rates between points on their lines and the preferred port New Orleans. They also participate in joint rates from points on other lines of railroad in the territory involved to and from the Texas ports. Other lines, such as the St. Louis Southwestern, Chicago, Rock Island and Pacific, Chicago, Rock Island and Gulf, St. Louis-San Francisco, and a number of other carriers serve directly with their own rails neither the preferred port New Orleans nor any of the prejudiced Texas ports, but participate in joint rates between points on their lines and both New Orleans and the Texas ports. Other lines, such as the Southern Pacific and the Gulf Coast Lines of the Missouri Pacific System, serve directly with their own rails both New Orleans and Galveston.

Obviously, were the contention of appellants sound, but meager relief could be afforded any of the points involved from prejudices or preferences which might be practiced by the single carriers or groups of carriers serving such points. Also, obviously, a single and unhampered control of the rates to both the preferred and

prejudiced points here involved will be found only in the rare case of a line which with its own rails served both points, and even as to such lines such free and unhampered control would not exist in the case of rates to and from points on its connections because there also rates may not be adjusted without some form of agreement between the parties accomplished either by negotiation, or existing power of attorney to some agent, or otherwise.

As to that large class of carriers in the vast territory involved, such as the St. Louis Southwestern, Chicago, Rock Island and Pacific, Chicago, Rock Island and Gulf, and St. Louis-San Francisco, which with their own rails serve directly neither the preferred nor the prejudiced points, it is apparent that in no manner could such lines exercise singly and alone the option to either raise one rate or reduce the other. Either action in their case must be through some form of agreement as heretofore stated.

It is readily seen, therefore, that if the contention of appellants is sound, the greatest part of the control of the Interstate Commerce Commission over preferences and prejudices is done away with and one of the primary purposes of the Interstate Commerce Act defeated. Such however, is not the law. As was said by this Court in *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, at page 144:

> "Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them."

For a carrier to be guilty of prejudice and preference it is not necessary that such carrier must have the ability, acting singly and alone, to adjust either the preferential or the prejudicial rate. All that is necessary is participation in the wrongful act. As this Court said in *Chi-*

cago, Indianapolis & Louisville Ry. Co. v. *United States,* 270 U. S. 287:

> "Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury."

Appellants here actively participate in inflicting the injury. They serve New Orleans, the port found preferred, with rates to and from points on their own lines of railroad and rates to and from points on their connections, and they also participate in a complete line of joint through rates between points on their lines of railroad and the Texas ports found prejudiced. They are parties to both the preferential and the prejudicial act. The order of the Commission to remove such injury is properly applicable to them.

The extent to which the Interstate Commerce Commission may exercise its jurisdiction to remedy unlawful preferences and prejudices was determined by this Court in *United States* v. *Illinois Central R. R. Co.,* 263 U. S. 515. In that case the local rate of the Illinois Central from Fernwood, Miss., to Ohio River crossings on lumber was found to prefer Fernwood and to prejudice Knoxo, Miss, on the line of the Fernwood & Gulf, and a Section 3 order was made against both the Illinois Central and the Fernwood & Gulf, operating from Knoxo to a junction with the Illinois Central Railroad at Fernwood, to remove such prejudice and preference. In that case a contention was made similar to that here made by the Texas & Pacific and Louisiana & Arkansas Companies, and the port of New Orleans. In rejecting this contention the Court said at page 520:

> "It is contended that the order exceeds the powers of the Commission. The argument is that a carrier cannot be held to have participated in an unjust discrimination unless it is a party both to the rate by

which a preference has been given to others and to the higher rate which is given to the complainant; that the Fernwood & Gulf did not participate in the discrimination complained of, since it did not join in the lower rates from other points by which the Swift Lumber Company claims to be prejudiced; and hence, that it cannot be required to co-operate with the Illinois Central in reducing rates from Knoxo which have been found to be inherently reasonable. That on the other hand, the Illinois Central cannot be held to have subjected the Swift Lumber Company to undue prejudice, since Knoxo is not on its own lines *and it is not in a position to remove, by its own act, the discrimination complained of. Neither proposition is sound.* Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. By joining with the Illinois Central in establishing the prejudicial through rate from Knoxo, the Fernwood & Gulf became as much a party to the discrimination practiced, as if it had joined also in the lower rates to other points which are alleged to be unduly preferential. Compare *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it. Moreover, it is not true that the Illinois Central cannot remove the discrimination without the co-operation of the Fernwood & Gulf. The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood, or by raising the rate from Fernwood, or by giving both an intermediate rate. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. The Illinois Central, acting alone, is in a position to raise the rate from Fernwood. For its main line extends from there to the Ohio River crossings, the rate-breaking point." (Italics ours.)

This Court has there interpreted Section 3 and set forth the conditions under which the Commission may issue an order against carriers to cease and desist from

a violation of that section. The facts here are much stronger than those before the Commission in the case just cited. There the Fernwood & Gulf contended it did not participate in the discrimination complained of since it did not join in the lower rates from other points by which the Swift Lumber Company claimed to be prejudiced. Here the Texas & Pacific and Louisiana & Arkansas Companies, by their own action, not joined in by any other carrier, make the rates to New Orleans which prefer that port and which prejudice the Texas ports, and at the same time participate in a complete line of joint through rates on the commodities involved between points on their lines of railroad and the Texas ports. On the other hand, the Illinois Central contended that it could not be subjected to a Section 3 order because Knoxo was not on its lines and it was not in position to remove, by its own act, the discrimination complained of. This Court said, however, neither proposition is sound.

In *United States* v. *Illinois Central Railroad, supra*, the Court deals at great length with the discrimination between Fernwood and Knoxo, Miss. It should not be overlooked, however, that there was decided in the same opinion Case No. 38, which was an appeal from a decision of a Federal court in Wyoming dismissing a bill seeking to enjoin the order of the Commission in *Pioneer Lumber Company et al.* v. *Director General et al.*, 64 I. C. C. 485. In that case rates on lumber and lumber products, in carloads, from points in Idaho, Montana and Washington to Ucross and Buffalo, Wyo., were found unduly prejudicial and such prejudice ordered removed. Ucross and Buffalo, Wyo., are located on the Wyoming Railway, a short line of railroad connecting with the Chicago, Burlington & Quincy at Clearmont, Wyo. The prejudice found consisted in the failure to apply a blanket

rate on lumber, applicable among other points at Clearmont, to Ucross and Buffalo, Wyo., on the short line.

In disposing of this appeal this Court said (527):

> "In No. 38, where the short line alone seeks to set aside the Commission's order, this additional fact requires mention. The rate to the short line points is not a joint rate, but a combination of the trunk line rate to the junction and the short line local rate. The distinction is without legal significance in this connection. A through route was established; and the transportation is performed as the result of this arrangement between the carriers, expressed or implied. Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases."

There the Wyoming Railway was found guilty of a violation of Section 3, although it did not participate in joint rates beyond the junction point with the trunk line. Its participation was solely in a local rate from points on its line to a junction with the Burlington and a Section 3 order was issued against the Burlington and the Wyoming Railway to remove the prejudice. Here the case is much stronger. The Texas & Pacific and Louisiana & Arkansas Companies actually participate in joint through rates to the points found to be prejudiced and initiate and maintain their own single-line rates to the points found to be preferred.

This Court in *United States* v. *Illinois Central Railroad, supra,* has laid at rest for all time the doctrine enunciated by the Commission in the *Ashland Fire Brick Company case,* 22 I. C. C. 115, to the effect that a carrier can not be held liable for a violation of Section 3 unless it can, by its own act, and without the concurrence of any connection, remove the discrimination found to exist by changes in the rates to either the preferred or prejudiced points.

Another expression of this Court contrary to the contention of appellants is found in *St. Louis Southwestern Ry. Co.* v. *United States, supra,* where at page 144 the Court says:

> "Carriers insist also that the order is void on the ground that, since their 'rails do not reach Paducah, they cannot be guilty of discrimination against that city.' They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it."

Discrimination was found to exist by the Commission, and while the order of the Commission was one requiring the establishment of through rates under Section 15 of the Act, nevertheless the Court has laid down a guide as to when discrimination may be found to exist.

A further and later case approving the doctrine announced in *United States* v. *Illinois Central, supra,* and repudiating the contention made by appellants is *Chicago, Indianapolis & Louisville Ry. Co.* v. *United States, supra.* In that case an order of the Interstate Commerce Commission requiring several carriers to remove discrimination against another carrier resulting from their refusal to make switching arrangements with it such as existed among themselves was upheld by the Court. At page 292 of the opinion of the Court the following language appears:

> "It is argued that, as a matter of law, a carrier cannot be guilty of unjust discrimination unless it is able by its own act to remove the inequality; that where there is no direct physical connection with the railroad alleged to be discriminated against, and no

joint service is being rendered by the three steam railroads with the South Shore, there cannot, in law, be unjust discrimination, because the existing inequality can be removed only by the consent of a third party, the intermediate carrier.

The order does not require the steam railroads to extend any service to the South Shore. It leaves them free to remove the discrimination by any appropriate action. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 521. Direct physical connection with the carrier subjected to prejudice is not an essential. *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury. *United States* v. *Pennsylvania R. R. Co.*, 266 U. S. 191, 197-9. There is nothing to the contrary in *Central R. R. Co. of N. J.* v. *United States*, 257 U. S. 247. The relief sought there was denied solely because the Central, although it participated in establishing the through route and joint rate, did not participate in the service which alone was alleged to constitute discrimination. Here each of the steam railroads was an effective instrument of the discrimination complained of."

The above case is also interesting because it explains and distinguishes the case of *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247, which is to a great extent relied upon by appellants in this case. As pointed out, however, that case furnishes no sound authority for the position of appellants. There was there involved the validity of a Section 3 finding based upon the granting of certain transit privileges upon creosote by southern railroads, which privileges were not granted by railroads in trunk line and New England territory, and the finding was based particularly upon the fact that

joint rates were participated in by the New England, trunk line and southern carriers. The plants and shippers in the North were alleged to be prejudiced by the granting of certain free transit privileges by the southern carriers. The prejudice, however, did not arise out of the joint rates. The Court, at page 259, says:

> "But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as to where a lower joint rate is given to one locality than to another similarly situated."

Here the Texas and Pacific and Louisiana & Arkansas Companies have participated in that which causes the unjust discrimination. The discrimination is caused by a preferential rate to and from New Orleans and prejudicial rate to and from Galveston. The Texas & Pacific and Louisiana & Arkansas Companies singly and alone make the preferential rates between New Orleans and points on their lines and participate in the prejudicial rates between points on their lines and the Texas ports.

In the Texas & Pacific brief on reargument an effort is made to differentiate the facts in *United States* v. *Illinois Central, supra,* from those present in the case at bar, it being stated at page 41 of that brief that in the former case "the trunk lines were in control of the rate adjustment from both the allegedly preferred and the allegedly prejudiced points." It is apparent from an examination of the opinion in *United States* v. *Illinois Central, supra,* that such was not the case. While the trunk line, Illinois Central, might, acting singly and alone, increase the rates from Fernwood, Miss., upon its own line of railroad, to reduce the rate from Knoxo on the Fernwood & Gulf required the joint action of the Illinois Central and its connection the Fernwood & Gulf. So also

in *Wyoming Railroad Company* v. *United States,* decided in the same opinion, the trunk line, Burlington Railroad, might increase the rate from its junction with its connection, the Wyoming Railroad, but to reduce the rate from points on the short line, Wyoming Railroad, required the concurrent and joint action of both the carriers. In neither case was there an alternative which might be exercised by the trunk lines acting singly and independently of their connections. In considering these cases appellees again point out that in *United States* v. *Illinois Central, supra,* the short line participated solely in the rate from the point found to be prejudiced and in no way participated in the rate from the point found to be preferred, while in this proceeding the Texas & Pacific and Louisiana & Arkansas Companies participate in rates to and from both the preferred and prejudiced points.

Nor is the participation by the appellants in rates to and from the Texas ports merely incidental or negligible. In the brief on reargument of the Texas & Pacific and Louisiana & Arkansas Companies, at pages 43 and 44, it is pointed out that those appellants are under legal compulsion to establish through routes and rates to and from those ports under Section 1, paragraph (4), of the Act, and under potential compulsion as a matter of law under Section 15, paragraph (3), of the Act, and present compulsion as a practical matter, to continue such joint rates. Therefore, it is the position of those appellants that though they serve and participate in the traffic to New Orleans, and as common carriers under the Interstate Commerce Act are under both legal and practical necessity to participate in the rates and traffic to and from the Texas ports, they may continue thus to serve both localities without becoming amenable to Section 3 of the Interstate Commerce Act in so far as it prohibits preferences

and prejudices. Upon its face such position is clearly unsound.

In the briefs of appellants a number of opinions of the Interstate Commerce Commission are cited to sustain their contention as to the necessity of individual alternative in order to give validity to a Section 3 order. A lengthy discussion of the facts in such cases is believed unnecessary. In so far as they are contrary to the doctrine laid down by this Court in *United States* v. *Illinois Central, supra,* they do not correctly state the law. Among such cases principally relied upon by appellants is the *Ashland Fire Brick case,* 22 I. C. C. 115. While the doctrine announced in that case has been definitely departed from by the Commission in its decision in the instant proceeding, relying upon the opinion of this Court in *United States* v. *Illinois Central, supra,* and also departed from in the case of *Duluth Chamber of Commerce* v. *C. & N. W. Ry. Co. et al.,* 156 I. C. C. 156, appellees point out that the facts before the Commission in this case are not analogous to those presented to it in the *Ashland Fire Brick case.* In that case the St. Louis-San Francisco Railway Company carried rates from St. Louis to Birmingham which were alleged to be preferential, and the Chesapeake & Ohio and Louisville & Nashville carried rates from Ashland, Ky., to Birmingham which were alleged to be prejudicial. While the Louisville & Nashville had a route of its own from St. Louis to Birmingham, the St. Louis-San Francisco did not participate in any rates from Ashland, Ky., to Birmingham, nor did the Chesapeake & Ohio, which participated in the joint rates from Ashland to Birmingham, participate in any rates from St. Louis to Birmingham. On the other hand, in the case at bar the Texas & Pacific and Louisiana & Arkansas Companies are parties to rates both to the points preferred and points prejudiced. The cases are clearly distinguishable.

Likewise distinguishable is the recent case *Paper and Paper Articles Between Western Trunk Line Points*, I. & S. Docket 3724, decided August 12, 1932, cited at page 39 of the Texas & Pacific brief on reargument. In that case also there is lacking the necessary participation in the preferential and prejudicial rates. As appears from the quotation on the page referred to in the Texas & Pacific brief, the Commission found:

> "Except in a purely incidental degree and to an almost negligible extent, the element of a common responsibility for, *or participation in, rates both from the Eastern and Western mills is lacking.*" (Italics ours.)

On the other hand, the Commission in a number of recent cases has by its orders directed the removal of preference and prejudice found to exist where the participation therein by the carriers in the rates involved was not present to the extent which it is in the case at bar.

In *Nueces County Navigation District* v. *Abilene & Southern Ry. Co.*, 155 I. C. C. 712, the failure of defendants to provide export and coastwise rates on cotton and cotton linters from points in various southwestern states to Corpus Christi, Texas, no greater for like distances than similar rates contemporaneously maintained to other Texas ports, was found unduly prejudicial to Corpus Christi and preferential of other Texas ports and such violation of the law ordered removed. At page 714 of that decision it is stated:

> "An identical mileage basis of rates, subject to our jurisdiction, applies generally from Texas points of origin to all Texas ports, except as hereinafter noted, for coastwise movement beyond the State of Texas. These rates do not include wharfage at the ports. To Corpus Christi this scale or, in certain instances, somewhat lower specific rates are applied by the Southern Pacific and Missouri Pacific sys-

tems and the Texas Mexican from points on their lines, but not by other lines operating in Texas. On export traffic from Texas points moving through Texas ports specific rates apply predicated upon a similar mileage basis. The amounts of the rates include cost of delivery to steamships at the ports. Wharfage charges not to exceed 2 cents are absorbed by the rail carriers out of these rates. To Corpus Christi these export rates also are applied only by the Southern Pacific and Missouri Pacific systems and the Texas Mexican from points on their lines and not by other lines in Texas.

From points of origin in the States other than Texas through rates, generally on a group basis, are maintained on cotton to most of the Texas ports but not to Corpus Christi."

In that case, therefore, it appears from the opinion that carriers such as the Santa Fe and Missouri-Kansas-Texas served and maintained export and coastwise rates to Texas ports other than Corpus Christi, but neither served nor participated in any joint export and coastwise rates from points on their line to Corpus Christi.

Nevertheless a Section 3 order was entered against the Santa Fe and Missouri-Kansas-Texas under those circumstances, the Commission finding that the failure of those and other defendants to maintain export and coastwise rates from the origin territory considered to Corpus Christi upon a level no higher than rates contemporaneously maintained for like distance to other Texas ports, was unduly prejudicial to Corpus Christi and unduly preferential of other Texas ports. In the case of the Texas & Pacific and Louisiana & Arkansas Companies in this proceeding there is even more ground for a Section 3 order because those carriers do actually participate in joint through rates to the prejudiced ports.

In the case of *International Paper Company et al.* v. *A. & V. Ry. Co.*, 153 I. C. C. 171, rates on wrapping paper and other paper articles from Bastrop and West

Monroe, Louisiana, to destinations in southern territory were found unduly prejudicial to those points and preferential of New Orleans and Bogalusa, Louisiana, and East Moss Point, Kreole and Pascagoula, Mississippi. As shown in the Commission's opinion, Bastrop is served by the Arkanas & Louisiana Midland Railway, the Bastrop & Lake Providence Railway, and the Missouri Pacific Railroad. West Monroe is a local station on the Yazoo & Mississippi Valley Railroad. The finding in that opinion was that the rates assailed in so far as the same defendants, or any of them, participate in the transportation from the complaining points on the one hand and one or more of the competing points on the other, were and for the future would be unduly prejudicial to complainants and unduly preferential to those competitors in New Orleans, Bogalusa, East Moss Point, Kreole and Pascagoula. This order was directed against practically all railroads in southern territory, and therefore a line such as the Atlantic Coast Line Railroad, with its own rails to neither the preferred nor prejudiced points, became amenable to the Section 3 order by participation in rates and transportation from both the preferred and prejudiced points. Obviously a line such as the Atlantic Coast Line, reaching none of the points, could not by its independent act affect rates from either the prejudiced or preferred points.

The Commission has constantly and consistently entered prejudice and preference orders under the circumstances appearing in this case. Probably the most sweeping preference and prejudice order ever made by the Interstate Commerce Commission was that it entered in *Consolidated Southwestern Cases*, 123 I. C. C. 203. In that case it prescribed scales of reasonable maximum rates on numerous classes and commodities in interstate commerce through the southwestern States of Oklahoma,

Arkansas, western Louisiana, southern Kansas, southern Missouri, and Texas, and also prescribed such scales as bases for use in constructing rates between the vast territory just described and defined territories in the eastern part of the United States. It also found many inconsistencies, prejudices and discriminations existing in the southwestern rate structure and required that such situation be remedied by its Finding No. 27, which, in substance, provided that if the defendants elected to maintain any lower rates from or to points found to be unduly preferred, rates upon a similar level must be established and maintained from or to points found to be unduly prejudiced.[1] Such a sweeping finding could never

1. The broad extent of the prejudice and preference found to exist in the *Consolidated Southwestern Cases* is shown in the territorial description of the findings as taken from the syllabus of that case:

> 3. As to all-rail traffic from Oklahoma, Arkansas, western Louisiana, Kansas-Missouri territory, Missouri River cities, Mississippi River gateways, and defined territories to Texas, and from Texas to Oklahoma, Arkansas, and western Louisiana, the Texas common-point rates on articles embraced in No. 14880 found to result in undue prejudice to the complaining northeast Texas cities and in undue preference of other Texas points to the south and west, including the Houston-Galveston group, as indicated.
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> 4. All-rail class and commodity rates on articles embraced in No. 14880 from Mississippi River gateways, Missouri River cities, Kansas-Missouri territory, and defined territories to Texas, Oklahoma, Arkansas, and western Louisiana found to result in undue prejudice to the complaining northeast Texas cities and in undue preference of points in Oklahoma, Arkansas, and western Louisiana as indicated.
>
> 5. Class and commodity rates on articles embraced in No. 13535 between Mississippi River gateways, Missouri River cities, and defined territories, on one hand, and points in Oklahoma and in Texas, Arkansas, Kansas, designated portion of Missouri, and western Louisiana, on the other, found to result in undue prejudice to Oklahoma and in undue preference of the other named States or parts of States as indicated.
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> 6. Class and commodity rates on articles embraced in No. 13535 between Oklahoma and designated portions of Kansas and Missouri, in their relations to relatively lower intrastate rates within those portions of Kansas and Missouri, found to result in undue prejudice and preference and in unjust discrimination against interstate commerce as indicated.
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> 7. Class and commodity rates on articles embraced in No. 13535 between Oklahoma and Texas, and on articles embraced in No. 14416 from Little Rock, Ark., to Texas, in their relations to relatively lower rates between Shreveport, La., and Texas, and

be made under the interpretation sought to be given Section 3 by appellants here, and it is significant to point out that appellants Texas & Pacific Railway Company and Louisiana & Arkansas Companies have not challenged the validity of the Section 3 order made in the *Consolidated Southwestern Cases.*

In support of their theory that Section 3 of the Interstate Commerce Act should be so interpreted that undue preference and prejudice could not be found to exist unless there lay within the power of a single carrier the ability to cure such situation by increases in the preferential rate or reductions in the prejudicial rate, appel-

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from Shreveport to Texas, respectively, found to result in undue prejudice and preference as indicated.

8. Class and commodity rates on articles embraced in No. 14880 between Oklahoma and the complaining northeast Texas cities, in their relations to relatively lower intrastate rates in Oklahoma, and on articles embraced in No. 13535 between Oklahoma and points in Texas common-point territory, in their relations to relatively lower intrastate rates within the latter territory, found to result in undue prejudice and preference and in unjust discrimination against interstate commerce as indicated.

9. Class and commodity rates on articles embraced in No. 13535 between Oklahoma and points in Texas differential territory, in their relations to relatively lower intrastate rates within the differential territory and between that territory and Texas common-point territory, found to result in undue prejudice and preference and in unjust discrimination against interstate commerce as indicated.

10. As a whole, intrastate class and commodity rates in Texas, in their relations to corresponding rates between St. Louis, Mo., and Texas, are not shown to result in undue prejudice or preference, but in some instances, such as rates between Houston-Galveston-Beaumont and northern and northeastern Texas, the intrastate rates result in undue preference, to the undue prejudice of shippers and receivers in St. Louis territory.

11. Class and commodity rates on articles embraced in No. 13535 (a) between Oklahoma and Arkansas, in their relations to relatively lower rates between Arkansas, on one hand, and St. Louis, Mo., Memphis, Tenn., and New Orleans, La., on the other; (b) between Oklahoma and western Louisiana in their relations to relatively lower rates between western Louisiana, on one hand, and St. Louis and Kansas City, Mo., and Memphis, on the other; and (c) between Oklahoma and Texas, in their relations to relatively lower rates between Texas, on one hand, and St. Louis and Memphis, on the other; found to result in undue prejudice and preference as indicated.

12. Class and commodity rates on articles embraced in No. 14880 (a) between the complaining northeast Texas cities and points in western Louisiana other than New Orleans and Shreve-

lants refer in their briefs to several English cases in which it is asserted such interpretation was given Section 2 of the *English Railway and Canal Traffic Act of 1854* (17 & 18 Vict. c. 31), after which was modeled paragraph (1) of Section 3 of the Interstate Commerce Act. In connection with these cases appellants refer to *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 145 U. S., 263, where the Court at page 284 stated it may be presumed that Congress had in mind the construction given the words "undue preference" by the English courts, and would therefore draw the conclusion that this Court should follow such English cases. In the first place, in none of the cases cited by appellants decided prior to 1887, when paragraph (1) of Section 3 was first

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port, in their relations to relatively lower rates between western Louisiana, on one hand, and Memphis, Tenn., and St. Louis and Kansas City, Mo., on the other, and (b) between the complaining cities and Arkansas in their relations to relatively lower rates between Arkansas, on one hand, and Memphis, Kansas City, St. Louis, and New Orleans, on the other, found to result in undue prejudice and preference as indicated.

13. Class and commodity rates on articles embraced in No. 13535 between Arkansas and Oklahoma, and on articles embraced in No. 14880 between Arkansas and the complaining northeast Texas cities, in their relations to relatively lower intrastate rates within Arkansas, found to result in undue prejudice and preference and in unjust discrimination against interstate commerce as indicated.

14. Class and commodity rates on articles embraced in No. 13535 between Oklahoma and western Louisiana, and on articles embraced in No. 14880 between western Louisiana and the complaining northeast Texas cities, in their relations to relatively lower intrastate rates in western Louisiana, found to result in undue prejudice and preference and in unjust discrimination against interstate commerce as indicated.

15. Ocean-rail rates between north Atlantic ports and interior trunk-line and eastern defined territory points, on one hand, and points in Kansas and in the Southwest, including Texas differential territory, on the other, via south Atlantic and Gulf ports, found unreasonable and unduly prejudicial and preferential as indicated. Maximum reasonable and nonprejudicial rates prescribed. Findings in *Rates to Southwestern Destinations*, 95 I. C. C. 188, that ocean-rail rates via Gulf ports should not exceed 80 per cent of combinations on those ports and should include marine insurance, overruled.

The *Consolidated Southwestern Cases* has been reopened as to a number of features and as to prejudice and preference in connection with rail-and- water rates, but the findings of prejudice and preference have so far been substantially unchanged.

incorporated in the Interstate Commerce Act, is there a specific holding that a carrier can not be guilty of undue preference although it participates in some way in both the preferential and prejudicial rates, unless it alone has available to it alternative ways of curing the undue preference. In so far, however, as any such cases may be construed to announce such an interpretation of the English Act, it is directly contrary to the interpretation heretofore placed upon Section 3 of the Interstate Commerce Act by this Court.

The doctrine that when a statute has been adopted from another State or country, the judicial construction already placed upon such statute by the highest court of the jurisdiction from which it is taken accompanies it, and is treated as incorporated therein, is subject to certain well-defined exceptions. The general rule is by no means absolute or imperative on the courts of the adopting State. See *Viterbo* v. *Friedlander*, 120 U. S. 707; *Groves* v. *Sentell*, 153 U. S. 465; *Meyer* v. *Richards*, 163 U. S. 385.

In fact, there is in the very case of *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co., supra*, relied upon by appellants as authority for the English interpretation of undue prejudice, a strong declaration by the Court that the American Act was broader in its scope than the English Act. At page 284 of the Court's opinion it is stated:

> "These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination."

The rule that the adoption of a foreign statute carries with it the prior construction in the originating State is applicable only where the terms of the statute are of

doubtful import so as to require construction. *Public Service Ry. Co.* v. *Board of Public Utility Commissioners*, 81 N. J. L. 363, 80 Atlantic 27. Certainly there is nothing ambiguous or of doubtful import in the language of paragraph (1) of Section 3.

Likewise this doctrine is not applicable where the courts of the adopting State or country are clearly of opinion that the foreign construction is erroneous and that its application would lead to denial of a substantial right. *Whitney* v. *Fox*, 166 U. S. 637; *Coulam* v. *Doull*, 133 U. S. 216. This Court is clearly of opinion that if the English courts had placed upon their Act the construction contended for by appellants, such construction is erroneous and would lead to denial of substantial rights. In *Chicago, Indianapolis & Louisville Ry. Co.* v. *United States, supra*, the Court stated:

> "Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury."

In *St. Louis Southwestern Ry. Co.* v. *United States, supra*, this Court said:

> "Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it."

Were the theory of law advocated by appellants upheld, a violation of Section 3 could never exist in the case of a joint through rate. Certainly it was the intention of Congress that the provisions of Section 3 should apply as forcefully to the joint undertakings of carriers as to their single acts, that is, to their joint rates as well as to their local rates, and that where a rate structure was found to be preferential of one point and prejudi-

cial of another, all carriers participating in the rates to both points might be found guilty of the unlawful act and required to cure it.

IV.

A DISCRIMINATION MAY BE UNLAWFUL AND UNJUST WHEN MEASURED BY THE TRANSPORTATION STANDARD, AND CONDEMNED BY THE COMMISSION, ALTHOUGH THE PREJUDICIAL AND PREFERENTIAL RATES BE THE SAME IN CENTS PER HUNDRED POUNDS.

The contention appears throughout the briefs of appellants that preference and prejudice can not be found to exist in a situation where the rates to and from New Orleans are the same as to and from the Texas ports regardless of differences in distance, and that an actual difference in the rates in cents per hundred pounds must exist before Section 3 can be violated. At page 21 of the brief on reargument of the Texas & Pacific it is stated that the orders in controversy condemn not a disparity but an equality between the New Orleans and Galveston rail rates. As heretofore pointed out, the finding of prejudice and preference is a matter of fact to be found by the Commission, and this finding of fact where the prejudicial and the preferential rates are the same has ample support in the decisions of the Commission and of the courts, and in sound logic.

Section 3 of the Interstate Commerce Act declares:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of

traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Under such a theory preference or advantage, or prejudice or disadvantage, could exist only where the rates considered were different in cents per 100 pounds. Such a theory would mean that the mandate thus placed upon the carrier as to equality of treatment of places, persons, and localities would be satisfied merely by equality in the amount of the charge, together with a complete disregard of the service performed for that charge. Equality or parity in the measure of the charge for the service performed would be wholly irrelevant and immaterial.

Such a doctrine necessarily leads to absurd results. If, as in this case, the requirements of Section 3 are satisfied so long as traffic to or from one port is charged no higher in cents per 100 pounds than to or from another port, for distances 200 miles and greater, neither could preference nor prejudice result from the charging of the same rate in cents per 100 pounds on traffic to one point for a haul of 100 miles as was charged to another point for a haul of 2,000 miles. While the case just instanced might be extreme, nevertheless if the doctrine is true as to the 200 mile difference in haul it would be equally logical in the case of the 2,000 mile haul. Under such a theory all economic advantage of geographical location would be swept away.

The answer of the Commission to this contention when put forth by the Texas & Pacific in argument before it is contained in its second report, 128 I. C. C. at page 379, where it says (Rec., 3404):

> "This carrier contends that an equality in rates such as that here complained of can not be unduly prejudicial. The cases which it cites do not support this view of the law. It is a familiar principle that each community is entitled to the benefits arising from its natural advantages."

The Commission's finding as to the existence of prejudice and preference is further supported in its finding on page 384 of its report on rehearing, 128 I. C. C. 349, (R., 3410) that transportation conditions throughout the territory involved were substantially the same and that therefore the transportation cost to and from the respective ports would be approximately upon the same level. That finding is as follows:

> "No witness seriously questioned the finding, first made in *Memphis-Southwestern Investigation,* 55 I. C. C. 515, 523, and since consistently adhered to by us, that the transportation conditions throughout Oklahoma, Arkansas, Louisiana west of the Mississippi River, and Texas common-point territory are substantially the same. The transportation conditions in southern Kansas are at least as favorable as those in the other portions of the Southwest just referred to. With these findings as a base it must follow, unless special circumstances exist with respect to particular commodities, that the differences in distance between the average hauls to the respective ports must approximate the differences in extent and cost of the services rendered by the respective carriers. We say approximate because the differences in volume of traffic and the varying degrees of efficiency in operation and management on the roads forming the various routes between this territory and the Gulf make impossible, of course, an equality of unit cost on every commodity."

It should further be pointed out that no party to this proceeding seriously questions the above finding. It is true the Texas & Pacific and other parties make some claim as to lesser costs upon traffic to or from New Orleans when such traffic is not charged its proper proportion of total cost but considered wholly as added traffic. However, the natural desire of a railroad to increase its business does not justify a violation of Section 3, and further, the evidence of the Texas & Pacific upon such point was wholly defective, as will be pointed out later, and was properly rejected by the Commission.

Under the circumstances above described the Texas ports are entitled in their competition with New Orleans to rates based upon an equality of service in the transportation to and from such respective ports. And such equality is not accorded by rates equal merely in cents per 100 pounds. This doctrine was announced by the Commission in *Elk Cement & Lime Company et al.* v. *B. & O. R. R. Co. et al.*, 22 I. C. C. 84, in which case cement mills located in Michigan complained that rates maintained by defendants from cement mills in the Lehigh Valley in Pennsylvania to destinations in Central Freight Association territory preferred such Pennsylvania mills and prejudiced themselves. As shown on pages 87 and 88 of the Commission's report, rates from a representative Michigan cement mill to the destinations involved ranged from 6½ cents for a haul of 216 miles to 11½ cents for a haul of 434 miles, while rates from a representative mill at Coplay, Pa., to the same destinations ranged from 11.25 cents for a haul of 650 miles to 17.9 cents for a haul of 1013 miles. It should be noted that the rates from the alleged prejudiced points were substantially less than from the alleged preferred mills in Pennsylvania. In that case the defendants made the same contention as here made by appellants and the Commission in no uncertain terms rejected such contention. Referring to the contention of the defendants the Commission states on page 88:

> "It was their contention in brief and on argument that no discrimination could be predicated on rates from the mills of complainant to Detroit and other points in central freight association territory, because in every instance there is a higher aggregate charge from the Lehigh Valley district. With this contention we can not agree. If the contention of the defendants is the law, then followed to its logical conclusion carriers would have the right to completely nullify distance and give shippers far removed from consuming markets absolute control of

prices in such markets as against shippers located near thereto. Indeed, it is charged by the complainants in this case that when Lehigh Valley district shippers have supplied the eastern markets they 'dump' their surplus in Detroit and other central freight association points at less than cost of manufacture and make prices so low that the business is no longer profitable. It appears to be the practice of all cement producers to 'dump' their surplus product in certain large competitive consuming markets, but the complainants assert that when they undertake to rid themselves of their surplus they are confined in their markets and are compelled to ship under rates of freight which are much higher than those enjoyed by their competitors. From the figures given herein it is clearly apparent that the Michigan cement manufacturer can not ship to the east for any great distance, nor can he do so to most points in central freight association territory except he meets the competition from the Lehigh Valley district shippers. In so far as the carriers which make joint through rates to Detroit and other consuming points also make rates from the Lehigh Valley district mills to competitive central freight association points, they unduly discriminate against the Michigan producers and relatively they are at a disadvantage."

The Commission found that the discrimination against the Michigan mills was represented by the difference between the rates charged them and the Lehigh Valley district shippers for relative distances and directed defendants to publish rates which would remove such discrimination.

A recent case in which a complainant paid actually lower aggregate charges per 100 pounds was found to be prejudiced by rates higher in cents per 100 pounds, but relatively lower, service considered, is *American Distilling Company* v. *A. C. & Y. Ry. Co. et al.*, 160 I. C. C. 366, 153 I. C. C. 717, 140 I. C. C. 633. In that case, which dealt with rates upon denatured alcohol from Pekin, Ill.,

and New Orleans, La., to destinations in central territory, the existing rates from Pekin to the destinations involved were lower in cents per 100 pounds than from New Orleans. Prejudice was found to exist, however, and it was ordered removed by the observance of differences in rates from Pekin less than those from New Orleans to specified points in central territory as shown by specific amounts in an appendix to the second supplemental report of the Commission in 160 I. C. C

A similar contention to that made here was made before the Commission in *Southern Kansas Grain & Grain Products Association* v. *C. R. I. & P. Ry. Co. et al.*, 139 I. C. C. 641. In that case the complainant alleged undue prejudice and preference arising out of the action of the carriers in permitting at Kansas City transit on grain and grain products without out-of-line charge where the route from origin to final destination of such commodities through Kansas City were materially longer than routes through Wichita. At page 670 the Commission stated:

> "Counsel for the opposing interveners urges, on brief, that while there might be unusual circumstances under which a finding of undue prejudice could be made in a situation where a complaining community enjoys a parity of rates with its alleged preferred competitor, no such finding could be made in this case because complainants have failed to prove as a fact that they have actually lost business as a result of the practices assailed. Conceding this failure of proof it is not believed that this position can be sustained. A marked geographic advantage sugests something better than a rate parity."

Where a point paying a higher aggregate rate complains that it is being prejudiced by a point paying a lower aggregate rate the Commission has frequently found such prejudice to exist and adjusted the rates to a similar level, transportation conditions considered.

A recent case involving that principle is *California Fruit & Produce Company et al.* v. *A. T. & S. F. Ry. Co. et al.*, 148 I. C. C. 285, 160 I. C. C. 733. In that case, which involved, among other issues, rates on apples from the State of Washington to San Diego, Calif., the Commission upon page 739, after pointing out that the spread under the southwestern scale for the distance of 74 miles between San Diego and Los Angeles would be 3.3 cents, found that the rates on apples under attack were and would be prejudicial to dealers in San Diego and unduly preferential of similar interests at Los Angeles to the extent that the rates to San Diego exceed those to Los Angeles by more than 3 cents per 100 pounds.

In such a case it is doubted that appellants here would seriously contend that the Commission was without power to find the prejudice existing and to remove it in the manner in which they did; that is, a lower rate was found to be prejudicial to a higher rate by reason of the fact that the then existing differences between the rates did not properly reflect the different transportation conditions and required that such situation be remedied by rates upon relatively the same basis. If the fact of the prejudice be conceded and the propriety of the remedy admitted in those cases where the preferential rate is the lower rate, the theory is equally sound in the reverse situation where the contention is made that a point paying a lower or the same rate is prejudiced by a point paying a higher or the same rate, transportation conditions considered. If the theory is correct in one instance it must of necessity be so in the other. Stated in another way, competing points and parties are entitled to rates relatively upon the same basis, transportation conditions considered. As was stated by this Court in *United States* v. *Illinois Central R. R. Co., supra,* (page 524):

> "To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrim-

ination practiced is unjust when measured by the transportation standard."

The contention of appellants that preference or prejudice can not arise out of rates equal in cents per hundred pounds has no support in logic and has been rejected by the Commission and the courts. The finding of the Commission in this case is neither arbitrary nor unreasonable. It gives effect to a doctrine announced by itself and approved by the courts.

V.

IN ITS DECISIONS IN THE PROCEEDING UNDER REVIEW THE COMMISSION GAVE SERIOUS CONSIDERATION AND WEIGHT TO THE COMPETITIVE NATURE OF THE EXPORT, IMPORT, AND COASTWISE TRAFFIC INVOLVED, IN THAT IT PERMITTED COMPLETE EQUALIZATION OF THE PORTS FROM A WIDE TERRITORY, AND WHERE FULL EQUALIZATION WAS NOT PERMITTED IT PRESCRIBED BUT NOMINAL DIFFERENTIALS.

Appellants urge that the Commission failed to give consideration to the competitive nature of the traffic here involved and to all the circumstances and conditions attendant thereon, including the water rates beyond the ports. Such contention is not supported by the record.

Truly analyzed, appellants' contention is not that the export, import, and coastwise nature of the traffic is a matter which should be considered by the Commission, but that by reason of such nature of the traffic the jurisdiction of the Commission to say at what point under a policy of complete equalization of inland rail charges a preference and prejudice becomes undue and unlawful In other words, because there is involved commerce which moves beyond the ports the jurisdiction of the Commission over the inland rail portion of such commerce is withdrawn.

The Commission properly answered such contention in the following language from its 1927 report (Rec., 3404-05):

> "The Texas & Pacific insists that since this traffic neither originates at nor is destined to any of the ports, the rail rates which we are here considering are in essence proportional rates, constituting merely factors of the aggregate (fol. 5201k-31) through rates between the interior points and the foreign or coastwise destinations beyond, and that in determining the matter of port equalization consideration should be given, not only to the rail factors, but also to the water factors which enter into these aggregates. In *Tobacco from Ohio River Crossings*, 73 I. C. C. 384, division 2 found a similar contention to be without merit. Equalization of port rates on the basis advocated by this carrier would require consideration, in every instance of port relationship, of water rates not on file with us and over which, except on coastwise traffic under certain circumstances, we have no jurisdiction. This does not mean, however, that the fact that a port is not the origin or destination of the traffic passing through it is not entitled to consideration in countenancing greater disregard of distance in import, export, or coastwise rates than in corresponding domestic rates."

Thus the Commission, while pointing out its lack of jurisdiction over the water charges beyond the port, nevertheless recognizes and states that the export, import, and coastwise nature of the traffic is a fact to be given consideration by it in determining to what extent carriers may disregard distance and service without such advantage and corresponding disadvantage becoming undue and unlawful. Section 1 of the Interstate Commerce Act gives jurisdiction to the Commission as to export and import traffic "only in so far as such transportation * * * takes place within the United States." As to coastwise traffic, the Commission, where it is authorized and undertakes to make joint rail and water

rates, may consider the water haul, but even in that case differences in rail haul are important factors. Joint rail and water rates were, however, not involved in the proceedings before the Commission. Although without jurisdiction over the water haul the Commission actually gave effective consideration and weight to the fact that the traffic involved had a water haul beyond the ports.

That appellants contend for lack of jurisdiction in the Commission over the rail portion of foreign and coastwise traffic rather than that such fact is a matter to be considered by the Commission, is apparent from the language appearing on page 20 of the Texas & Pacific brief on reargument. There it is said:

> "It is contended by appellees, however, that the Commission by the orders in controversy has not compelled a strict adherence to mileage; and it is true that at page 380 of its 1927 report (R. 3405) there is a half-concession that in the rates on traffic passing through the ports distance may be disregarded to a greater extent than in the case of domestic rates. It is plain, however, that the Commission did not *act* with regard for any such consideration."

Thus, although considerably greater latitude in ignoring transportation conditions and service in the case of export, import, and coastwise traffic than in the case of domestic traffic, is permitted by the Commission, the Texas & Pacific would claim that the Commission acted without any regard for such consideration, because complete and unlimited equalization of ports and consequent ignoring of transportation conditions was not authorized by the Commission. Stated otherwise, the contention of the Texas & Pacific is that if commerce transported within the United States over railroads subject to the Interstate Commerce Act be export, import, or coastwise in nature, jurisdiction over such commerce is

withdrawn from the Commission. And if it be withdrawn as to Section 3, as contended by appellants, is it not as logical to contend that such commerce be withdrawn from the provisions of Section 1 of the Interstate Commerce Act and the Commission be without power to declare whether such rate were reasonable or unreasonable? The mere statement of such proposition indicates its unsoundness.

In this connection the Court's attention is called to the fact that a number of witnesses favoring New Orleans and supporting port equalization testified there was some limit beyond which carriers should not be permitted to go in equalizing competitive points. Moulton (Rec., 820); Rhett (Rec., 476); Lallande (Rec., 482-485). It is obvious that if there be some point at which a complete equalization of competing ports would become improper and unlawful, the jurisdiction to determine the point at which such advantage or disadvantage becomes undue rests with the Interstate Commerce Commission. Under the theory of appellants, however, the carriers would become sole judges of such fact and in substance they would be freed from the provisions of Section 3 as long as the commerce involved was export, import, or coastwise in nature.

Appellants rely largely upon *Texas and Pacific Railway Company* v. *Interstate Commerce Commission*, 162 U. S. 197, as authority for the proposition that the Commission is impotent to interfere with the equalization of rail charges to different ports in the case of rail charges for export and import traffic. That case is no authority for such a broad doctrine. The main issue before the Court in that case is stated at page 205 of the Court's opinion:

> "We come now to the main question of the case, and that is whether the Commission erred, when making the order of January 29, 1891, in not taking

> into consideration the ocean competition as constituting a dissimilar condition, and in holding that no circumstances and conditions which exist beyond the sea-board in the United States could be legitimately regarded by them for the purpose of justifying a difference in rates between import and domestic traffic."

That case is not authority for the doctrine that in making rates upon export or import traffic preference or prejudice may be permitted as between different localities and communities. It only declares that the export and import nature of such commerce may be a matter considered by the Commission. In fact, in the concluding paragraph of the Court's opinion at page 239 it was pointed out that there was no person, firm, or corporation complaining that he or they had been aggrieved by the disparity between the export and domestic rates.

In support of the proposition that the Commission in this case should have considered the entire through charge, the brief on reargument of the New Orleans Joint Traffic Bureau, page 14, cites two English cases. The authorities given, however, are not pertinent, because in each case they deal with actual through rates published and quoted as such from inland points in England or Ireland to ports or inland points in the said parts of the United Kingdom, and by specific authority the railway companies of the United Kingdom are given permission to publish such rates in one figure, showing separately the amount accruing for the rail and water hauls, respectively. This appears from the following quotation from *The Londonderry Port and Harbour Commissioners* v. *The Great Northern Railway Company (Ireland), et al.*, 5 Railway and Canal Traffic Cases 282, 292:

> "Here we may observe that it has not been unusual for Parliament, when granting applications by railway companies for steamboat powers, to re-

quire that where persons travelling, or sending goods, both by railway and by sea, are charged one through fare or rate for the whole distance, a tariff of all such through fares and rates shall be published, showing their amount, and distinguishing the portion thereof which is attributed to the sea route from the portion attributed to the land route, and thus to prevent the steamboat charge and the railway charge from being blended into one."

Illustrative of the same condition is the following quotation from *Dublin and Manchester Steamship Company* v. *London and North-Western Railway Company*, 15 Railway and Canal Traffic Cases 88, 98:

> "A second point, and one of much less importance, arises under sub-section 5 of section 33 of the Railway and Canal Traffic Act, 1888, which enacts as follows: 'Where a railway company carries merchandise partly by land and partly by sea, all the books, tables and documents touching the rates of charge of the railway company which are kept by the railway company at any port of the United Kingdom used by the vessels which carry the sea traffic of the railway company, shall, besides containing all the rates charged for the sea traffic, state what proportion of any through rate is appropriated to conveyance by sea, distinguishing such proportion from that which is appropriated to the conveyance by land on either side of the sea.'"

The rail charges to the English and Irish ports dealt with in the above cases were in fact but parts of through rates, authorized by acts of Parliament to be stated and published as such.

Further, the English cases cited constitute no precedent justifying consideration by the Commission of the entire rail and water haul through the ports of Galveston and New Orleans, in view of the extent to which the undue preference section of the British statutes are extended to traffic by sea, as evidenced by Section 28 of the Railway and Canal Traffic Act of 1888 set forth below (51 and 52 Vict. c. 25):

"The provisions of section two of the Railway and Canal Traffic Act, 1854, and of section fourteen of the Regulation of Railways Act, 1873, and of any enactments amending and extending those enactments, shall apply to traffic by sea in any vessels belonging to or chartered or worked by any railway company, or in which any railway company procures merchandise to be carried, in the same manner and to the like extent as they apply to the land traffic of a railway company."

There is no counterpart to such enactment in the Interstate Commerce Act.

While a local rate may not properly be compared with a true proportional rate or with the earnings to a particular carrier under a joint rate published by it and several other carriers for a continuous haul, that situation is not at all present in this proceeding. The rail carriers of the United States could not lawfully join with the steamship companies to and from foreign points, in publication of single factor joint through rates between points in the United States and foreign ports. Under the Interstate Commerce Act the charge for the rail transportation within the United States must be published separately and its reasonable non-discriminatory character and lawfulness is within the jurisdiction of the Interstate Commerce Commission. It has no jurisdiction whatsoever of the charges beyond the ports of the United States. The situation is not analogous whatsoever.

The Commission, however, did give serious and effective consideration to the fact that the traffic involved was export, import, and coastwise traffic and not all-rail domestic traffic. This consideration is manifested in two respects. Under the orders of the Commission complete equalization is permitted of New Orleans with the Texas ports where the difference in distance to New Orleans does not exceed that to Galveston by more than approximately 25 per cent; and in those cases where the

difference in distance to New Orleans exceeds that to Galveston by more than 25 per cent, the prescribing of minimum differentials Galveston under New Orleans materially less than would result from the application of scales prescribed in the same territory by the Commission for application to domestic traffic.

In *Consolidated Southwestern Cases,* 123 I. C. C. 203, the Commission prescribed scales of reasonable maximum rates on numerous classes and commodities in interstate commerce throughout the southwestern states of Oklahoma, Arkansas, western Louisiana, southern Kansas, southern Missouri, and Texas, and also prescribed such scales as bases for use in constructing rates between the vast territory just described and defined territories in the eastern part of the United States. It also found many inconsistencies, prejudices and discriminations existing in the southwestern rate structure and required that such situation be remedied by its Finding No. 27, which, in substance, provided that such discriminations and prejudices should be removed by the uniform application throughout the territory involved of the scale of rates prescribed as reasonable, and that if defendants elected to maintain any lower rates upon any class or commodity in such territory between any two points, such lower basis would have to be established and maintained from or to all points found to be unduly prejudiced.

In this connection it should be pointed out that Exhibit B-17, reproduced in Volume VI of the record herein (Reproduction of Stipulated Exhibits), indicates that the differentials prescribed for the differences in distance between the Texas ports and New Orleans are materially less than the differences in rates for similar distances as prescribed in *Consolidated Southwestern Cases, supra,* and in other cases in which the Interstate Commerce Commission has prescribed mileage scales on commodi-

ties for application in southwestern territory. While the *Consolidated Southwestern scales* do not apply to export, import, and coastwise traffic, as such, in most cases domestic rates are the basic rates on export, import, and coastwise traffic. As one illustration of the showing made in Exhibit B-17, page 3 thereof indicates that from stations Marshall to Sweetwater on the Texas & Pacific the average rate on green coffee would be 17.3 cents higher from New Orleans than from Galveston, and 21.4 cents higher from New Orleans than from Houston, whereas the differential required by the Commission in this proceeding is but 9 cents. This establishes clearly that the Commission in prescribing the differentials involved here has not accorded to the Texas ports the entire benefit of their geographical location, but has given serious and effective consideration to the export and import character of the traffic. Such character of the traffic was an element which might properly be considered by the Commission and it was so considered. The position of appellants, however, stated in its true aspect, is not that the Commission failed to give proper weight to the character of the traffic, but that by reason of the character of such traffic the Commission is without jurisdiction over the inland rail portion thereof and can not by lawful order require adjustment in the rail rates to and from competing ports where it finds preference and prejudice such as is prohibited by Section 3 of the Interstate Commerce Act to exist and is powerless to correct such violation of the law regardless of the extent to which distance and cost of service in the case of traffic to the respective ports may be disregarded by competing carriers. There is no such impotence in the Interstate Commerce Act to remedy a violation thereof.

VI.

THE ORDERS OF THE COMMISSION UNDER ATTACK IN THIS PROCEEDING WERE NOT ORDERS DESIGNED TO REGULATE INDUSTRY. THEY CONSTITUTE A PROPER EXERCISE OF THE COMMISSION'S JURISDICTION TO REGULATE RATES AND CHARGES OF CARRIERS AND ARE FOUNDED SOLELY ON TRANSPORTATION CONDITIONS.

It is contended in the briefs of appellants that the orders of the Commission here involved had for their purpose the overcoming of assumed commercial and economic advantages of New Orleans and the diversion of tonnage from such port to the Texas ports. This contention, which is essentially the same in all of the briefs, is stated at page 8 of the brief on reargument of the New Orleans Joint Traffic Bureau in the following language:

> "Stated differently, the orders sought to be restrained were made in consequence of an assumption by the Commission that it possessed the extreme power to prohibit competition on equal terms between the carriers serving the Louisiana ports and the carriers serving the Texas ports, and on the assumption that it had the power to adjust rates so as to equalize commercial and industrial conditions."

As appears from the above quoted language, this contention of appellants is based upon their fundamental error in assuming that a mere equality in rates per hundred pounds to and from the competing ports constitutes competition on equal terms. The actual difference in treatment of the competing points in the degree of service is conceded, and as heretofore pointed out such difference in treatment does not constitute the equality enjoined upon the carriers by paragraph (1) of Section 3. By their very essence the orders do not give an advantage to the Texas ports but are designed to remove an undue prejudice which the Commission found exist-

ing against them in the rate adjustment, and to more nearly place the Texas ports upon an equality with New Orleans. If as a result of such orders a part of the commerce flowing through the Port of New Orleans under its preferential rate adjustment should thereafter move through the Texas ports, such fact in no way stamps the action of the Commission as a regulation of industry rather than of transportation. It is obvious that the removal of a disadvantage against one point would result in the regaining by it of some of the business which had been lost to it through an unlawful and undue preference of another point.

The effect of the orders of the Commission here under review was not to give an advantage to the Texas ports but to partially remove their existing disadvantage which the Commission found undue and unlawful. And it should be borne in mind that such actual disadvantage of the Texas ports was but partially remedied by the orders of the Commission. Such orders did not completely condemn equalization of the two sets of ports but permitted it in all cases where the distance to New Orleans was not more than 25 per cent greater than to the Texas ports, and in those instances where the distance to New Orleans was greater than 25 per cent a basis of rates was permitted which produces much smaller differentials between the two ports than would result by giving full effect to transportation conditions as is indicated by the fact that such differentials are greatly less than would be warranted by similar differences in distance under the distance scales prescribed by the Commission upon domestic traffic moving in the same territory. Therefore, the Louisiana ports still have a relatively more favorable adjustment of export, import, and coastwise traffic than do the Texas ports.

Although it is apparent upon the face of the record that the orders herein were made by the Commission

solely for the purpose of removing an unlawful preference and prejudice, the Commission has nevertheless carefully pointed out that its orders were not intended to regulate industry or commerce, or were based solely upon commercial conditions. To the extent that it gave any consideration to commercial conditions it actually permitted a more favorable adjustment to New Orleans than would be justified solely from a consideration of transportation conditions. The Commission in discussing the equalization policy pursued generally by the carriers with regard to rates to and from New Orleans and the Texas ports, says (Rec., 3360):

> "New Orleans has certain natural advantages over Galveston which have affected the relationship of rates to the two ports. It is situated on the Mississippi River, at a natural division between, and terminus of, lines operating both east and west thereof. It therefore draws freight from both east and west of the river and by barge line down the river, which insures it not only a greater volume but a wider variety of freight than goes to Galveston, which is dependent upon the southwestern lines. This fact in itself warrants careful scrutiny of a rate adjustment which is alleged to be unduly prejudicial to the port least favored by natural advantages. While those natural advantages are entitled to consideration in so far as they have been brought about by geographical location, they are not entitled to much respect in so far as they have been brought about by rate advantages such as those here complained of. So far as the territory west of the Mississippi River, which we are here considering, is concerned, the difference between the natural advantages of New Orleans and Galveston is small. Both ports are natural objectives for export and coastwise freight originating in that territory. The Southern Pacific lines reach both ports and the Missouri Pacific system, through control of the International-Great Northern and the Texas & Pacific, serves both ports. The policy of the southwestern carriers serving New Orleans, more particularly the Texas & Pacific, has been, generally speaking, to apply the Galveston rates to New Orleans on traffic

> moving from or to all points west of the Mississippi River, except points in Texas south of the Texas & Pacific. Such an adjustment necessarily disregards distance and commercial instead of natural advantages control. We have consistently refused to condemn such an adjustment where it is shown to serve the best interests of the public, but where, as here, it builds up one port at the expense of another equally favored by natural advantages from the origin territory here considered, a line must be found beyond which distance may not be disregarded."

In the above quotation the Commission merely announces that where one point possesses certain natural advantages over another point such fact warrants careful scrutiny of a rate adjustment which is alleged to be unduly prejudicial to the port least favored by natural advantages, because, while such natural advantages are entitled to considertion in so far as they are brought about by geographical location, they are not entitled to respect in so far as they have been artificially created by rate advantages. The above quotation is no evidence of an intention of the Commission to regulate industry or manipulate a rate adjustment, or to control economic conditions by the manipulation of a rate adjustment.

Again at page 368 of its report on further hearing (Rec., 3391) the Commission states:

> "While such commercial advantages as are above enumerated cannot be determinative of rate relationships, and few of them can be taken into consideration in passing upon the question of undue prejudice, they serve to confirm the impression that the advantages of New Orleans, whether natural or acquired by progressive enterprise, are so superior to those of the Texas ports that an affirmance of the findings in the original report would not be likely to cause serious injury to the port of New Orleans."

Again is there an express disclaimer by the Commission of any intention to consider commercial advantages as determinative of rate relationships.

Further on page 369 of its report on further hearing (Rec., 3391) the Commission says:

> "Healthy competition is no less important between ports than between rail or water carriers. There is, however, a limit beyond which the disregard by rail carriers of the geographical advantages of one port in favor of another will impair rather than promote healthy competition between the ports. There is much ground for believing that a policy of port equalization, if carried beyond reasonable limits, has the effect of strengthening unduly, at the expense of others, those ports which by reason of natural or acquired advantages have attained commanding positions in the export and import trade. Such a policy also encourages waste in rail transportation."

Again at page 387 of its report on further hearing (Rec., 3414) the Commission states:

> "We have consistently declined to disrupt rate groupings, particularly where they have existed for many years, unless it was shown that the preference or prejudice which they involved resulted in substanital injury to complaining shippers or localities. The finding in such cases, where this has not been shown, has been that the preference or prejudice is not undue. In other words, we have not taken the initiative in requiring carriers to depart from the principle that every shipper or community is entitled to the advantages of its location, but where carriers have voluntarily departed therefrom and such departure has not caused substantial injury to any prejudiced party, we have not undertaken to interfere; and even where injury is shown, the preference or prejudice may, within limits, be justified by competition. *Maritime Asso., Boston Chamber of Commerce* v. *A. A. R. R. Co., supra*, pages 565-567. But where it is shown that extensive grouping or port equalization, voluntarily maintained by the same carriers, without justification by competition, has disregarded substantial differences in distance and has resulted in substantial injury to shippers or localities, we have found such grouping or port equalization to be unlawful, and in the latter class of cases have prescribed reasonable rate dif-

ferences. *Mobile Chamber of Commerce* v. *M. & O. R. R. Co.*, 57 I. C. C. 554; *Inland Empire Shippers' League* v. *Director General*, 59 I. C. C. 321."

The Commission, therefore, expressly disclaims any intention to regulate commerce or industry. It finds, however, intense competition between the Texas ports and New Orleans in the traffic here involved; that the carriers have generally, with some exceptions, carried equal rates to and from both sets of ports notwithstanding substantial differences in distance; and it finds testimony of Galveston interests that such equality of rates has caused them injury in their competition with New Orleans. Then at page 384 of its report (Rec., 3410) the Commission after pointing out that no witness seriously questions its finding first made in *Memphis-Southwestern Investigation*, 55 I. C. C. 515, 523, that transportation conditions throughout the territory involved were substantially the same, says:

> "With these findings as a base it must follow, unless special circumstances exist with respect to particular commodities, that the differences in distance between the average hauls to the respective ports must approximate the differences in extent and cost of the services rendered by the respective carriers."

There is clearly, therefore, evidence of an intention not to equalize commercial or economic conditions, but to give to a prejudiced point rates based upon transportation conditions met in traffic to and from such prejudiced point as compared with traffic to and from the preferred point. In this connection it should be pointed out that Exhibit B-17, (Vol. VI., Reproduction of Stipulated Exhibits) indicates that the differentials prescribed for the differences in distance between the Texas ports and New Orleans are materially less than the differences in rates for similar different distances as prescribed in the *Consolidated Southwestern Cases*, and in other cases in which the Interstate Commerce Commission has pre-

scribed mileage scales on commodities for application in southwestern territory. While the *Consolidated Southwestern scales* do not apply to export, import, and coastwise traffic, as such, in most cases domestic rates are the basic rates on export, import, and coastwise traffic. As one illustration of the showing made in that exhibit, page 3 thereof indicates that from stations Marshall to Sweetwater on the Texas & Pacific the average rate on green coffee would be 17.3 cents higher from New Orleans than from Galveston, and 21.4 cents higher from New Orleans than from Houston, whereas the differential required by the Commission in Docket 12798 is but 9 cents. This indicates clearly that the Commission in prescribing the differentials involved here has not accorded to the Texas ports the entire benefit of their geographical location nor in any way sought to equalize commercial or economic advantages. It is, of course, obvious that when dealing with competitive traffic any change lawfully required in such rates must have some effect upon commercial and economic conditions. That such is true in no way affects the power of the Commission to regulate such rates in accordance with the provisions of the Interstate Commerce Act.

In *Edward Hines Trustees* v. *United States*, 263 U. S. 143, plaintiff sought to annul an order of the Interstate Commerce Commission requiring carriers to cancel certain penalty reconsignment charges, on the theory that such order hurt its business and was of advantage to certain competitors. At page 148 the Court says:

> "Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Compare *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 111. Plaintiffs' right is limited to protection against

> unjust discrimination. For discrimination redress must be sought by proceedings before the Commission. Its findings already made, and the order entered, negative such claim in this connection."

A similar contention that industry was being regulated was made in *Assigned Car Cases*, 274 U. S. 564. At page 583 in its opinion in that case the Court said:

> "Equally unfounded is the contention that, under the guise of regulating carrier instrumentalities, the Commission is seeking to equalize industrial fortune and opportunity. The object of the rule was not to equalize fortunes, but to prevent an unjust discrimination in the use of transportation facilities and to improve the service. * * * The contention is admittedly baseless if, as we have concluded, there is evidence to support the finding that the assigned-car practice causes discrimination in the use of other transportation facilities."

The above case is directly in point. In the instant case discrimination was found to exist and the yardstick used by the Commission in remedying the situation is clearly shown to be the relative cost of service of the traffic to and from the prejudiced and preferred points. That commerce and industry may be incidentally affected is without legal significance. The jurisdiction of the Commission was properly invoked, a violation of the law found and its removal required by a formula based upon transportation conditions. The contention that the order of the Commission here is one designed to regulate industry and not transportation is groundless.

VII.

THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION INVOLVED IN THIS PROCEEDING DO NOT UNLAWFULLY INTERFERE IN THE MANAGERIAL DISCRETION OF THE TEXAS & PACIFIC RAILWAY COMPANY NOR DEPRIVE THAT COMPANY OF DUE PROCESS OF LAW CONTRARY TO THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Appellant, Texas & Pacific Railway Company, urges that the orders of the Commission herein unlawfully interfere with its right to initiate rate policies in the exercise of its managerial discretion and deprive it of its property in contravention of the due process clause of the Fifth Amendment to the Constitution of the United States.

Both of these contentions are essentially the same and will be treated together.

The fallacy of the argument of this appellant appears in the very statement of the contention itself. At page 14 of its brief on reargument it is stated:

> "As well settled as the matters referred to in the first proposition, above, is the proposition that carriers have the right in the exercise of their managerial discretion to determine their rates and rate policies, subject to correction only if it is determined that some provision of law has been infringed."

There has properly been an interference to a limited extent with the complete freedom of managerial discretion of the Texas & Pacific, because the Interstate Commerce Commission, upon an adequate record, has determined that there has been an infringement of law; that the result of the policy of the Texas & Pacific is to unduly prefer one locality and to unduly prejudice another, in violation of paragraph (1) of Section 3 of the Interstate Commerce Act.

Stated concisely, the proposition of appellant is that it should be permitted to equalize rates to and from the Texas ports at New Orleans in order to secure the benefit of the full and complete use of such properties. The desire of carriers for business is understandable and so long as such rates are not otherwise unlawful they may maintain a rate adjustment designed to secure a greater share of the business for their particular line of railroad. Such desire, however, is without legal significance or effect upon Commission or Court when rates published to accomplish such purpose violate any section of the Interstate Commerce Act. The desire of a carrier to favor points upon its own lines of railroad can not excuse the publication or maintenance of rates which result in prejudice or preference to any locality, shipper or person. This doctrine was laid down by this Court in *Virginian Railway* v. *United States et al.*, 272 U. S. 658. In that case the Court condemned a prejudice and preference resulting incidentally from the intention and policy of the Virginian to develop its own business. The facts of the case and the principle of law enunciated are clearly set forth in the following quotation from the Court's opinion commencing on page 663 thereof:

> "The Virginian contends that the specific facts found are, as matter of law, insufficient to support the finding of undue prejudice. The facts material are these. Ever since the Virginian was constructed, it has adhered to the policy of providing for the output of mines on its line transportation only to tidewater. This policy is pursued, not only because it is deemed profitable to the company, but also because it enables the Virginian to furnish to shippers the most efficient service at reasonable rates. It has never held itself out as equipped to carry coal to the West, or joined in joint rates to western markets. The 45 mines on its line which enjoy the blanket rates to the West, have them as a natural result of certain trackage agreements entered into by the Virginian with the Chesapeake & Ohio for an en-

tirely different purpose. The purpose was to secure additional eastbound tonnage without wasteful expenditure by paralleling branch lines. To be able to secure the eastbound traffic from certain mines located on independent lines connecting with the Chesapeake & Ohio, the Virginian, having acquired the independent lines, sought the right to use that system's tracks to those mines. As compensation for the trackage rights over the Chesapeake & Ohio, it gave that company the right to use the Virginian's tracks to these 45 mines. The carriers, instead of using these trackage rights by operating over the other's tracks, substituted, solely as a matter of economy and convenience, a reciprocal switching arrangement. As a result, the Virginian hauls westbound coal from these 45 mines to a junction with the Chesapeake & Ohio; the latter absorbs the switching charges of the Virginian; and these mines enjoy the same rate to the West as do those located on the Chesapeake & Ohio. But the Virginian's purpose in making the traffic agreement was solely to increase its eastbound traffic.

The fact that the Virginian's intention was not to give the 45 mines a preference over others, but to increase its own eastbound business from mines located on the other system, and that the preference resulting is merely an incident of a legitimate effort to develop the carrier's eastbound traffic, is not of legal significance. These 45 mines to which the western market has been thus opened, obviously, enjoy thereby an advantage over the 54 mines, found to be similarly situated, to which the market is closed. And the Commission has found that the preference is unjust."

Dealing with a somewhat similar situation, in *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, the Illinois Central made the contention that the effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. The Court, however, in answer to this contention, on page 524 says:

"But preferences may inflict undue prejudice though the carrier's motives in granting them are honest."

Further on page 525 the Court continues:

"The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act 1920. *Texas & Pacific Ry Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 218, 220; *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 167, 175. In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. For now the interests of the individual carrier must yield in many respects to the public need, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184; and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate-policies of a competitor, which were theretofore uncontrollable. The order of the Commission was not an attempt to establish its own policy of rate-making. See *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 554. It merely expressed the judgment of the Commission that existing rates subjected shippers from Knoxo to undue prejudice. The judgment so exercised, being supported by ample evidence, is conclusive."

In substance the proposition of the Texas & Pacific is that rates made for the purpose of developing traffic on a carrier's lines are, by reason of such purpose, free from

any possible guilt of undue preference or prejudice. This Court, however, has stated that such facts inducing their publication are merely factors to be considered by the Commission. In this proceeding the Commission, upon an adequate consideration of all factors, has determined that the rate adjustment of the Texas & Pacific and of other carriers, prior to its decision, effected an undue preference of New Orleans and an undue prejudice of the Texas ports.

A further specific contention of the Texas and Pacific is made that when the traffic here involved is considered as so-called added traffic, that is traffic which it would not otherwise obtain, it can handle it upon a lower out-of-pocket cost than can the lines handling similar traffic to and from the Texas ports. The full and complete answer to that contention is also contained in the cases above cited. Even though the Texas and Pacific were greatly in need of added traffic, such need would not excuse the making of prejudicial or preferential rates from the viewpoint of the undue preference to New Orleans or prejudice to the Texas ports. There is no reason why the traffic here involved should be considered any differently from any other traffic handled by the Texas & Pacific Railway Company or by any other defendant. Nor is there in the record the slightest evidence that the unit costs of transportation upon the Texas & Pacific are lower than upon the Texas port lines. On the other hand the conclusion was properly reached by the Commission at page 385 of its report on further hearing that differences in lengths of haul considered, and without comparing special services on particular commodities, it costs at least as much per mile to handle tonnage over the Texas & Pacific to New Orleans or the other Louisiana ports as it does over the Gulf Colorado and Santa Fe or the Missouri-Kansas-Texas of Texas to Galveston or any other Texas port.

However, the so-called added cost computations of the Texas & Pacific were rejected by the Commission and properly so. Dealing with this subject the Commission in its second report on further hearing says (Rec., 3449):

> "It estimates that the out-of-pocket cost of such additional eastbound traffic on the Louisiana division would have been, per net-ton mile, 2.02 mills in 1926 and 2.14 mills in 1927. In contrast, it shows that on the Texas lines both the net-ton miles and freight-train miles are substantially greater southbound than northbound, which indicates, it contends, that their southbound trains are already fully loaded and that the additional traffic which might be diverted from the New Orleans carriers by the differentials in favor of the Texas ports sought in this case would require the running of additional trains, in which event it estimates that in 1926 the cost of such additional southbound traffic would have been 6.09 mills on the Santa Fe and 8.07 mills on the M-K-T. By similar computations of the system costs on the Santa Fe and the M-K-T of handling additional freight traffic without increased train miles, the Texas & Pacific arrives at 2.83 mills for the former and 3.84 mills for the latter. In arriving at these costs, however, no segregation is made between the northbound and southbound traffic over the Texas lines. These computations rest wholly upon estimates of the percentages of increase in various items of operating expense, 32 in number, which in the opinion of the witness who formulated them would result from a 10 per cent increase in train load. Without further data in support of these estimates the computations referred to are not convincing, but even if they were acceptable for the purpose intended, they compare improperly the system costs on both northbound and southbound traffic on the Texas lines with the costs on eastbound traffic only on the Louisiana division of the Texas & Pacific, on which division operating conditions are more favorable than on the lines of that carrier as a whole. No cost data for westbound traffic, with which this case is also concerned, were offered. What has just been said with respect to out-of-pocket costs on the Texas & Pacific applies also to somewhat

> similar data offered by the Louisiana Railway & Navigation system. The percentage of engine utility westbound on the Texas & Pacific, this carrier contends, indicates that additional tonnage in its present trains could also be handled in that direction, but it offered no figures to show that it could handle such additional tonnage any cheaper than the Texas lines, which could also handle additional tonnage in their present trains from and to the ports served by them."

As the Commission points out, the comparison is without value as like things are not compared. Costs upon a particularly favorable division of the Texas & Pacific are compared with system costs of other lines. Further, these costs are based upon train loading, and for the year 1926 the entire Texas & Pacific train loading was only 579 tons as compared with 825 tons for the Gulf, Colorado and Santa Fe, and the Texas & Pacific witness offering the costs in question admitted (Rec., 3272-3) that the average unit for the Texas & Pacific would be higher than on the Gulf, Colorado and Santa Fe.

It should be further pointed out that the increased expense in particular accounts account additional freight traffic without additional train miles, was based upon the personal estimate of the witness introducing that testimony, and referring to that fact he admitted (Rec., 3272) that if he and four or five equally able and competent statisticians and engineers were to prepare a formula there would be four or five different estimates occasioned by a 10 or 20 per cent increase in traffic, and that the gentlemen would not all arrive at the same percentage of increase as he arrived at. The witness also admitted (Rec., 3272) that he knew of no basis except probably a theoretical one to make a cost study of what the per cent of increase in each account would be.

In any event there is no more basis for considering this traffic added traffic in the cases of the Texas & Pa-

cific and the Louisiana & Arkansas Companies than in the case of the numerous other railway companies serving both the Texas ports and New Orleans. The desire of all of such lines to secure additional traffic, while natural and commendable is subject to the qualification that no provision of the Interstate Commerce Act be violated in so doing.

The foregoing is a full and complete answer to the contention of the Texas & Pacific that the orders of the Commission herein deprive it of its property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Commission has made a valid order based upon transportation conditions removing a prejudice against the Texas ports and a preference in favor of New Orleans. Due process is in no way denied the Texas & Pacific because were it able to ignore such violation of the law as found to exist it might increase its traffic. Such a contention was thoroughly considered and disregarded in *Virginian Railway* v. *United States et al., supra.* For the same reason there is no merit to the contention of the Texas & Pacific that the order of the Commission denies to it unlawfully the right to initiate and dictate its own rate policies. No one denies, least of all the Interstate Commerce Commission that a carrier has such right, but in initiating rates and rate policies it is equally obvious that a violation of any provision of the Interstate Commerce Act will not be permitted.

VIII.

THE ACTION OF THE INTERSTATE COMMERCE COMMISSION IN GRANTING FOURTH SECTION RELIEF CONSTITUTES NO PRECEDENT TO GUIDE ITS ACTIONS HERE. IN SO FAR AS FOURTH SECTION RELIEF TO CIRCUITOUS LINES TO MEET THE COMPETITION OF SHORT LINES IS CONCERNED, THE SITUATION IS IN NO SENSE ANALOGOUS; AND IN ANY CASE WHERE FOURTH SECTION RELIEF IS GRANTED IT MUST BE UPON A FINDING BY THE COMMISSION UPON THE FACTS BEFORE IT THAT SECTION 3 OF THE INTERSTATE COMMERCE ACT IS NOT VIOLATED.

Appellants urge that the orders of the Commission here involved are arbitrary because the Commission in the granting of fourth section relief in certain cases has applied a different rule as to circuity in the case of intermediate territory versus final destinations than it has applied here in the case of wholly different and competing ports.

In the first place, in those instances where fourth section relief is granted a circuitous line to meet the competition of a more direct route, the two situations are entirely different because there is involved in such case permission to carry the same rate for a greater distance than a shorter distance between common origins and common destinations, whereas in the proceeding before this Court the Commission is dealing with rates from common origins or destinations to different points. In the application of the same rate for a 600-mile distance as for a 400-mile distance to Galveston, that point is in no way affected. However, as the Commission found in these proceedings, Galveston was affected and injured by the carrying to or from a common point, New Orleans, the same rate for 600 miles as the same origin or destination for 400 miles.

Reference is made to *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.* 98 I. C. C. 183, covering rates upon cottonseed products, and *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.* 101 I. C. C. 116, covering rates upon grain and grain products. In those cases the Commission, upon the evidence before it, found that as a matter of fact the granting of fourth section relief therein would not result in undue prejudice to any intermediate point, whereas in these proceedings the Commission found, upon the evidence before it, that the carrying of the same rate to New Orleans for the longer distance as to the Texas ports for the shorter distance, resulted in prejudice to the Texas ports and preference of New Orleans. The finding of the Commission upon the facts before it in the cottonseed products and grain cases bears no relation to the finding of the Commission upon the facts before it in this case.

A further fallacy in the comparison of circuity permitted under the fourth section with the amount of additional service which should be permitted in making the same rates to different points is, that if the degree of circuity permitted in fourth section cases automatically establishes a rule for permitting the disregard of distance between competing points, this situation results. If the longer routes from a common point to Galveston are permitted to meet the short route up to a circuity of 50 per cent, and such percentage of circuity becomes proper in permitting the direct routes to meet at New Orleans the Galveston rate, then under the fourth section principle a further circuity must be permitted up to 50 per cent in allowing the longer routes to New Orleans to meet the shorter route to Galveston. Circuity is thus superimposed upon circuity. The two situations have nothing in common and neither forms any precedent for the other.

Reference is also made by appellants to *Export and Import Rates to and from South Atlantic and Gulf Ports*, 169 I. C. C. 13, where the Commission granted the direct line serving South Atlantic and Gulf ports fourth section relief for the purpose of meeting at common points, such as Chicago, Ill., competition for import and export traffic moving through eastern and North Atlantic ports, and to maintain higher rates at intermediate points. In that case, however, the Commission found, upon the facts before it, that the maintenance of the rates prayed for would not result in preference and prejudice to the North Atlantic ports. At page 44 of the Commission's opinion it is stated:

> "There is no doubt that any increase in the movement of foreign commerce to and from the interior territory via the southern ports would be accompanied by a corresponding relative decrease in the movement through the northern ports. However, unless the rates which produce this result are unduly preferential or unduly prejudicial or otherwise in violation of law, or contrary to the general public interest, as expressed in the law, the fact that they may divert traffic from one port or group of ports to another is no bar to the granting of fourth-section relief."

Upon the record in *Export and Import Rates, supra*, the Commission found that the rate adjustment approved would not result in undue preference or prejudice. The finding of fact upon the record before it in that case, however, has no relation to the finding of fact by the Commission upon the record in this case.

IX.

THE ORDERS OF THE COMMISSION HEREIN DO NOT CONSTITUTE A PREFERENCE OF THE PORTS OF ONE STATE OVER THOSE OF ANOTHER CONTRARY TO SECTION 9 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

It is contended in the brief on reargument on behalf of the Board of Commissioners of the Port of New Orleans that the orders of the Commission under review constitute a preference of the ports of one State over those of another contrary to Section 9 of Article I of the Constitution of the United States. That part of Section 9 of Article I of the Constitution relied upon is as follows:

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

In rejecting this contention, the Interstate Commerce Commission in its 1927 report referred to the language of this Court in *Armour Packing Company* v. *United States*, 209 U. S. 56, where it was stated at page 80:

> "The fact that regulation, within the acknowledged power of Congress to enact, may affect the ports of one State more than those of another, cannot be construed as a violation of this constitutional provision."

In the court below such contention was disposed of in the following language (*Texas & Pacific Ry. Co.* v. *United States*, 42 Fed. (2d) 281, 284):

> "Of these three contentions it is sufficient to say of the first, that the invocation of section 9, art. 1, to prevent a merely incidental result upon the ports of a state of an act or regulation of the Commission has never received the sanction of the courts, and further, that since the orders of the Commission are based upon its findings that the prohibited rates constitute an unjust preference of the Louisiana ports over the Texas ports, it follows that if the order is

supported by evidence the order does not give, but, in fact, prohibits a preference of the ports of one state over those of another; while if the finding is unsupported by the evidence, the order will fall not because it effects a preference of one port over another, but because the facts which authorize the exertion of the power are wanting."

Were Section 9 of Article I of the Constitution to be given the effect sought the Commission would be divested of all power to remove discriminations in the railroad rate adjustment to and from the various ports in the United States. By paragraph 3 of Section 8 of Article I of the Constitution, Congress is given power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and the Commission is but an arm of Congress executing that power through the instrumentality of the Interstate Commerce Act. By Section 1 of that act, pursuant and in full harmony with the constitutional grant of power, the provisions of that act are extended to the transportation of property "from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States." Therefore all of the provisions of the Interstate Commerce Act as to reasonableness of rates, the removal of discriminations, prejudices and preferences, are extended to the inland railroad haul of that part of the foreign commerce of the United States. Were that not so the Commission and Congress would be divested of all control of railroad rates to and from the various ports of the United States, in so far as those rates were applicable on traffic moving to or from foreign countries.

An obvious defect in the argument of appellants is, however, that as a matter of fact no preference has been given by the orders of the Interstate Commerce Com-

mission to the Texas ports over the port of New Orleans. To the contrary, the Commission has found in a proceeding in which it has proper jurisdiction, that the port of New Orleans had an actual preference in railroad rates applicable to export, import and coastwise traffic, and by its orders the Commission has merely required the partial removal of that preference. New Orleans still has to a lesser extent a preferential rate adjustment in its competition with the Texas ports, because under the orders of the Commission in all cases where the distance to New Orleans is not in excess of 25 per cent greater than the distance to the Texas ports transportation conditions may be ignored and the rates equalized, and even where the distance to New Orleans is in excess of 25 per cent greater than to the Texas ports the rate differences are not as of as great volume as would be reflected were the domestic rates prescribed by the Commission for application in the general territory applied to both sets of ports.

However, this contention of the Port of New Orleans has been completely disposed of by this Court in an opinion rendered subsequent to the argument and submission of this case during the October, 1931, term. In *Louisiana Public Service Commission* v. *T. & N. O. R. R. Co.*, 284 U. S. 125, the Court said at pages 130, 131, 132:

> "Appellants seek reversal on the grounds that the inclusion of the allowance for ferrying the Mississippi gives preference to Galveston, Houston and other ports of Texas over New Orleans and Baton Rouge in Louisiana in violation of the Constitution, Art. I, Sec. 9, cl. 6; * * *.
>
> "The power of Congress to regulate interstate and foreign commerce is exclusive and has no limitations other than such as arise from the Constitution itself. * * *
>
> "The clause of the Constitution invoked is: 'No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over

those of another; Nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.' The specified limitations on the power of Congress were set to prevent preference as between States in respect of their ports or the entry and clearance of vessels. It does not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States. The establishing of ports of entry, erection and operation of lighthouses, improvement of rivers and harbors and the providing of structures for the convenient and economical handling of traffic are examples. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 433-5. And see *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80. The construction for which appellants contend would strip Congress of much of the power that it long has been accustomed to exert and which always has been held to have been granted to it by the commerce clause."

Were the contention of appellants correct, and rates to and from the various ports could not be adjusted upon the basis of the transportation conditions applying upon the traffic to such ports, then the requirement of Section 9 of Article I of the Constitution could only be met by equal rates between any given common point and every port of entry or exit in the continental United States. The same rate in cents per hundred pounds would have to be maintained from a point in California for a transcontinental haul to the port of New York as was currently applied from an origin in New Jersey, but a few miles distant from the port of New York.

Conclusion.

The orders of the Interstate Commerce Commission involved in this proceeding are supported by substantial evidence of record, are within the power of the Commis-

sion to make, and the decree of the lower court dismissing the petitions for injunction should be affirmed.

Appellants in asserting that the Commission failed to give any consideration to the character of the export, import, and coastwise traffic here involved, in fact urge that the Commission is without any jurisdiction whatsoever of the rail haul to and from the ports. That the Commission gave effective consideration to the character of the commerce is indicated by the broad limits within which it permitted equalization, and by the fact that the differentials where prescribed are in volume materially less than would apply in the case of domestic traffic moving in the same territory under rates prescribed by the Commission. The contention, however, that the nature of the commerce requires the Commission to permit unlimited equalization of competing ports as to the traffic involved necessarily amounts to a contention for entire withdrawal of the Commission's jurisdiction over such rates. Such a proposition is obviously unsound.

The Texas and Pacific Railway Company and the Louisiana & Arkansas Companies, participating in rates to both the preferred and prejudiced points, are therefore guilty of the preference and prejudice found by the Commission, and its orders properly apply to those carriers.

Respectfully submitted,

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